

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 269 OF 2024
WITH
CIVIL REVISION APPLICATION NO. 270 OF 2024

1. Union of India

Through Defence Secretary,
Ministry of Defence,
New Delhi.

2. The Military Estate Officer

Military Estate Officer
Bombay & Gujrat Circle,
Colaba, Mumbai 400 005.

3. Mrs. Aarti Kant

Military Estate Officer
Bombay & Gujrat Circle
Colaba, Mumbai 400 005.

} ...Applicants
(Original Defendants)

-Versus-

Dr. Rustom Sam Boyce
Adult, Age & Occ not known,
Residing at Villa Hormuzd,
8A, M.L.Dahanukar Road,
Mumbai 400 026.

} ...Respondent
(Original Plaintiff No.1)

Mr. Shriram S. Redij, for the Applicants.

Mr. Mayur Khandeparkar a/w Mr. Sheroy M. Bodhanwalla, Ms. Sakshi Sharma and Mr. Akash Singh i/by. M.S. Bodhanwalla & Co., for the Respondent.

CORAM : SANDEEP V. MARNE, J.

Reserved On : 25 July 2024.

Pronounced On : 5 August 2024.

JUDGMENT :

1) Union of India has filed these Civil Revision Applications challenging the Orders dated 3 March 2022 passed by the Appellate Bench of the Small Causes Court, by which Misc. Appeal No.325 of 2015 filed by the Applicant-Union of India has been dismissed, whereas Misc. Appeal No.354 of 2014 filed by the Respondent/Decree-holder is allowed by determining the mesne profits in respect of the suit property at the rate of Rs. 2,50,000/- per month from the date of filing of the suit i.e. 29 July 1979 till 20 November 2022 along with interest @ 6% p.a. By its order dated 9 May 2014, the Small Causes Court had determined the amount of mesne profits @ Rs.2,00,000/- per month with a direction to pay the same from the date of filing of the suit till 20 November 2000 with interest @ 6% p.a. The Appellate Bench has enhanced the quantum of mesne profits to Rs. 2.50,000/- per month.

2) R.A.E.& R. Suit No.1429/4857 of 1979 was filed by Dr. Sam Framrose Boyce against Union of India and its Military Estate Officer for recovery of possession of the suit premises named Boyce Building

situated at Gowalia Tank Road, August Kranti Marg, Mumbai-400 026 (**suit premises**). The suit premises were let out to Defendant-Union of India on monthly tenancy. It appears that during pendency of the suit, Original Plaintiff passed away and his heirs, Dr. (Mrs.) Roshan S. Boyce and Dr. Rustom S. Boyce were brought on record. The suit came to be decreed on the grounds of arrears of standard rent and permitted increases by decree dated 4 September 2000. Defendant-Union of India was directed to handover possession of the suit premises to the Plaintiff. The claim for arrears of rent was however dismissed. The Small Causes Court directed separate enquiry into mesne profits from the date of filing of the suit till handing over of possession of the suit premises to the Plaintiff. The decree was confirmed by the Appellate Bench of the Small Causes Court on 6 June 2002. The decree was thereafter executed on 20 November 2002.

3) The Plaintiff/Decree-holder took out Misc. Notice No. 794 of 2003 for quantification of mesne profits under the provisions of Order 20 Rule 12(1)(c) of the Code of Civil Procedure, 1908 (**Code**). The Small Causes Court allowed Misc. Notice No. 794 of 2003 and determined the mesne profits in respect of the suit premises at the rate of Rs.2,00,000/- per month and directed the Defendant to pay the same from the date of filing of the suit i.e. 29 July 1979 till the date of execution of the decree i.e. 20 November 2002 alongwith interest @ 6% p.a.

4) Cross-Appeals were filed by the parties challenging the Order of the Small Causes Court dated 9 May 2014 before its Appellate Bench. Plaintiff/Decree-holder filed Misc. Appeal No. 354 of 2014 for enhancement of quantum of mesne profits as well as rate of interest, whereas, Defendant-Union of India filed Misc. Appeal No. 325 of 2015

challenging quantification of mesne profits @ Rs.2,00,000/- per month by the Small Causes Court. By two separate orders passed on 3 March 2022, the Appellate Bench has dismissed Misc. Appeal No. 325 of 2015 filed by the Defendant-Union of India. Misc. Appeal No. 354 of 2015 filed by Plaintiff/Decree-holder is however partly allowed enhancing the quantum of *mesne* profits to Rs.2,50,000/- with direction to the Defendants to pay the same from the date of filing of the suit i.e. w.e.f. 29 July 1979 till 20 November 2002 alongwith interest @ 6% p.a. Aggrieved by the orders passed by the Appellate Bench of the Small Causes Court on 3 March 2022, the Defendants-Union of India have filed the present Civil Revision Applications.

5) The delay in filing Civil Revision Application No. 269 of 2024 has been condoned by this Court by order dated 3 April 2024.

6) Mr. Redij, the learned counsel would appear on behalf of the Applicants in both the Civil Revision Applications and submit that the Small Causes Court and its Appellate Bench have erred in directing payment of mesne profits @ Rs. 2,50,000/- from the date of filing of the suit i.e. 29 July 1979 and that the same could have been directed to be paid, at the highest, from the date of the decree in the suit. That the suit being filed under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act (**Bombay Rent Act**) for recovery of possession of the suit premises, Defendants' possession in respect of the suit premises became wrongful only from the date of the decree and not from the date of the filing of the suit. He would rely upon judgment of the Apex Court in *Atma Ram Properties (P) Ltd. Versus. Federal Motors (P) Ltd.*¹ That therefore the contractual rent ought to have been directed to be paid during pendency of the suit. He would

¹ (2005) 1 SCC 705

submit that the direction of the Small Causes Court in the decree for conduct of enquiry into mesne profits from the date of filing of the suit did not mean that in mesne profits application, the Court was without jurisdiction to direct payment of mesne profits from the date of the decree and not from the date of filing of the suit. That it is well established position of law that mesne profits enquiry is independent of the main suit and that the Court conducting enquiry into mesne profits does not act as an Executing Court. That even if it is assumed that while conducting enquiry into mesne profits, the Court cannot go behind the decree, only contractual rent ought to have been fixed as mesne profits during pendency of the suit as Defendants were lawfully occupying the suit premises till passing of the decree. That Applicants are entitled to raise these points notwithstanding the fact that the same were not raised before the two Courts below.

7) Mr. Redij would also question correctness of the Small Causes Court's order fixing excessive amount of mesne profits of Rs.2,00,000/- per month and by the Appellate bench in further enhancing the same to Rs.2,50,000/-. That both the Courts failed to consider that the condition of the building was in dilapidated state and that the Applicants-Defendants have not earned any profits out of occupation of the suit premises. That the property was not correctly measured and the amount of mesne profits is computed on the basis of incorrect measurements. That the valuation report of Applicants-Defendants has been ignored. He would therefore pray for setting aside the orders passed by the Small Causes Court and its Appellate Bench.

8) Mr. Khandeparkar, the learned counsel would appear on behalf of the Respondent/Decree-holder and would oppose both the

Civil Revision Applications. He would submit that having not raised the plea of impermissibility to determine mesne profits from the date of filing of the suit before the Small Causes Court and Appellate Bench, Applicants-Defendants are now estopped from raising the same before this Court in exercise of revisionary jurisdiction under Section 115 of the Code. Taking me through the reply filed to the Misc. Notice No. 794/2003, Mr. Khandeparkar would submit that the objection about payment of mesne profits from the date of filing of the suit was never raised before the Small Causes Court. That Applicants cannot now be permitted to raise this objection under the garb of point of law as even such point of law is ultimately rooted in facts. That therefore the Applicants cannot be permitted to mount a collateral attack in execution proceedings and seek to alter the decree. That mesne profits enquiry is in the nature of execution of the decree and that therefore the Court conducting mesne profits enquiry cannot go behind the decree. That in the decree itself, the Small Causes Court directed conduct of enquiry into mesne profits from the date of filing of the suit and not from the date of the decree. That the decree has attained finality and cannot now be altered in mesne profits enquiry, which is in the nature of execution of the decree. That the scope of mesne profits enquiry is restricted to quantification of mesne profits and the Court conducting the enquiry cannot act contrary to the directions in the main decree for payment of mesne profits from the date of filing of the suit. That *res-judicata* applies in different stages in same proceedings. Mr. Khandeparkar would rely upon judgments of the Apex Court in Crompton Greaves Ltd Versus. State of Maharashtra² and Anderson Wright & Co. Versus. Amar Nath Roy and others³ in which the Apex Court has directed payment of mesne profits from the

² (2005) 11 SCC 547.

³ (2005) 6 SCC 489.

date of institution of the suit even in Rent Act suit. That both the judgments are rendered after considering the judgment in *Atma Ram Properties (P) Ltd.* He would also rely upon judgment of this Court in *Kalika Ramnihut Pandey & Ors. Versus. Smt. Nirmaladevi Vijaynarayan Dwivedi & Ors.*⁴ in support of his contention that while passing decree for possession of the property, Court can always direct an enquiry as to the rent or mesne profits from the date of institution of the suit until delivery of possession to the decree-holder.

9) So far as the quantum of mesne profits is concerned, Mr. Khandeparkar would contend that the suit premises comprised of four storeyed building consisting of 37 rooms spread over 12,000 sq.ft and located in the heart of Mumbai City at Gowalia Tank Road (near grant Road Station and Nana Chowk) and that therefore it cannot be contended, by any stretch of imagination, that the quantum of mesne profits determined by the Court is excessive. He would further submit that Applicants did not rely upon valuation report whereas Respondent/Decree-holder produced valuation report which is rightly taken into consideration by the Appellate Bench of the Small Causes Court. That though the said valuation report indicated rent at the rate of Rs. 6,13,970/-, the Plaintiff/Decree-holder prayed for reasonable amount of Rs.3,50,000/- per month, which is further scaled down by the Appellate Bench to Rs.2,50,000/-. He would submit that no interference is therefore warranted in the order passed by the Appellate Bench. During pendency of the Appeal, Applicants deposited amount of Rs.5,93,45,866/- in the Court on 9 November 2016. Inviting my attention to the order passed by this Court on 3 April 2024 while allowing application for condonation of delay, he would submit that Respondent/Decree-holder had shown willingness

⁴ 2017 SCC OnLine Bom 6587

to satisfy the claim by withdrawing the amount deposited by the Applicants alongwith accrued interest. He would pray for dismissal of both the Revision Applications.

10) Rival contentions of the parties now fall for my consideration.

11) Original Plaintiffs had instituted R.A.E. & R. Suit No. 1429/4857 of 1979 for recovery of possession of the suit premises by invoking provisions of Section 12 of the Bombay Rent Act on the ground of default in payment of rent. The suit came to be decreed on 4 September 2000 and the operative portion of the decree reads thus :

ORDER

The suit is decreed with costs.

The Defendants are hereby directed to handover vacant and peaceful possession of the suit premises described in schedule 1 Exh.-A annexed with the plaint i.e. Boyce Building situated at Gowalia Tank Road, (August Kranti Marg), Bombay- 400 026, within 3 months from the date of order.

The claim for recovery of arrears stands dismissed as arrears claimed were satisfied by depositing the amount in Court.

The balance amount lying in the Court as per scrutiny order dt.6.9.1980 shall be paid to the plaintiff on furnishing surety to the extent of balance amount.

Separate inquiry of mesne profit shall be commences from the date of filing of the suit till handing over the possession of the suit premises to the plaintiff.

The decree be drawn up accordingly.

(emphasis and underlining added)

12) In accordance with the direction for conduct of enquiry into mesne profits in the decree dated 4 September 2000, Plaintiff/Decree-holder took out Misc. Notice No. 794/2003 which came to be allowed by determining the quantum of mesne profits at the rate of Rs. 2,00,000/- per month. The Appellate Bench has enhanced the quantum

of mesne profits to Rs.2,50,000/- per month. Both the Courts have directed payment of amount of mesne profits from the date of institution of the suit i.e. 29 July 1979 till the decree was executed on 20 November 2002 and possession of the suit premises was obtained from Applicants-Defendants. Both the Courts have directed payment of amount of mesne profits alongwith interest @ 6 % per annum.

13) The first point raised by Applicants is about the correctness of the order of the Small Causes Court and the Appellate Bench in directing Applicants-Defendants to pay to the Plaintiffs mesne profits from the date of filing of the suit. It is contended that since the suit was filed under the provisions of the Bombay Rent Act for recovery of possession, possession of Defendants-Tenants during pendency of the suit remained lawful and that therefore mesne profits could not have been directed to have been paid from the date of institution of the suit and could only have been directed to be paid from the date of decree. The issue is no more *res integra* and is covered by judgment of the Apex Court in *Atma Ram Properties*.

14) In *Atma Ram Properties*, the Apex Court has dealt with three issues of (i) jurisdiction of the Appellate Court to pass order for payment of amount representing the losses occasioned by delay in execution of the decree by grant of stay order; (ii) the date from which tenant becomes liable to pay mesne profits or compensation for use and occupation of the premises in cases governed by the provisions of Delhi Rent Control Act, 1958 and (iii) effect of doctrine of merger resulting in postponing the date of termination of tenancy. For the purpose of this case, Issue No.(ii) decided by the Apex Court in *Atma*

Ram Properties is relevant. The findings recorded regarding Issue No. 2 in the judgment are as under:

11. Under the general law, and in cases where the tenancy is governed only by the provisions of Transfer of Property Act, 1882, once the tenancy comes to an end by determination of lease under Section 111 of the Transfer of Property Act, the right of the tenant to continue in possession of the premises comes to an end and for any period thereafter, for which he continues to occupy the premises, he becomes liable to pay damages for use and occupation at the rate at which the landlord could have let out the premises on being vacated by the tenant. In the case of ***Chander Kali Bai & Ors.*** the tenancy premises were situated in the State of Madhya Pradesh and the provisions of the M.P. Accommodation Control Act, 1961 applied. The suit for eviction was filed on 8th March 1973 after serving a notice on the tenant terminating the contractual tenancy w.e.f. 31st December 1972. The suit came to be dismissed by the trial Court but decreed in first appeal decided on 11th August, 1975. One of the submissions made in this Court on behalf of the tenant-appellant was that no damages from the date of termination of the contractual tenancy could be awarded; the damages could be awarded only from the date when an eviction decree was passed. This Court took into consideration the definition of tenant as contained in Section 2(i) of the M.P. Act which included "any person continuing in possession after the termination of his tenancy" but did not include "any person against whom any order or decree for eviction has been made". The court, persuaded by the said definition, held that a person continuing in possession of the accommodation even after the termination of his contractual tenancy is a tenant within the meaning of the M.P. Act and on such termination his possession does not become wrongful until and unless a decree for eviction is passed. However, the Court specifically ruled that the tenant continuing in possession even after the passing of the decree became a wrongful occupant of the accommodation. In conclusion the Court held that the tenant was not liable to pay any damages or mesne profits for the period commencing from 1st January 1973 and ending on 10th August 1975 but he remained liable to pay damages or mesne profits from 11th August 1975 until the delivery of the vacant possession of the accommodation. During the course of its decision this Court referred to a decision of Madhya Pradesh High Court in ***Kikabhai Abdul Hussain Vs. Kamlakar***, wherein the High Court had held that if a person continues to be in occupation after the termination of the contractual tenancy then on the passing of the decree for eviction he becomes a wrongful occupant of the accommodation since the date of termination. This Court opined that what was held by the Madhya Pradesh High Court seemed to be a theory akin to the theory of "relation back" on the reasoning that on the passing of a decree for possession, the tenant's possession would become unlawful not from the date of the decree but from the date of the termination of the contractual tenancy itself. It is noteworthy that this Court has not disapproved the decision of the Madhya Pradesh High Court in

Kikabhai Abdul Hussain's case but distinguished it by observing that the law laid down in *Kikabhai Abdul Hussain's* case was not applicable to the case before it in view of the definition of 'tenant' as contained in the M.P. Act and the provisions which came up for consideration of the High Court in *Kikabhai Abdul Hussain's* case were different.

17. In the Delhi Rent Control Act 1958, the definition of 'a tenant' is contained in clause (l) of Section 2. Tenant includes 'any person continuing in possession after the termination of his tenancy' and does not include 'any person against whom an order or decree for eviction has been made'. This definition is identical with the definition of tenant dealt with by this Court in *Chander Kali Bai's* case. The tenant-respondent herein having suffered an order for eviction on 19.3.2001, his tenancy would be deemed to have come to an end with effect from that date and he shall become an unauthorized occupant. It would not make any difference if the order of eviction has been put in issue in appeal or revision and is confirmed by the superior forum at a latter date. The date of termination of tenancy would not be postponed by reference to the doctrine of merger.

19. To sum up, our conclusions are:-

(1) while passing an order of stay under Rule 5 of Order 41 of the Code of Civil Procedure, 1908, the appellate Court does have jurisdiction to put the applicant on such reasonable terms as would in its opinion reasonably compensate the decree-holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed and in so far as those proceedings are concerned. Such terms, needless to say, shall be reasonable;

(2) in case of premises governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant contained in clause (l) of Section 2 of the Act, the tenancy does not stand terminated merely by its termination under the general law; it terminates with the passing of the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree;

(3) the doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter date.

(emphasis added)

15) Thus, in *Atma Ram Properties* the Apex Court held that in case of premises governed by the provisions of the Delhi Rent Control Act,

the tenancy does not stand terminated merely by its termination in the general law and that the same terminates with passing of the decree for eviction. Since the Apex Court had referred to its judgment in *Chander Kali Bai v. Jagdish Singh Thakur*⁵, it would be apposite to refer to that judgment as well. The Apex Court has considered definition of the term 'tenant' under Madhya Pradesh Accommodation Control Act 1961 and held as under:

8. For appreciation of the third point urged for the appellant it would be again useful to refer to a few corresponding provisions of the two Acts. In the 1955 Act, tenant was defined in clause (f) of Section 3 to mean "a person by whom rent is payable or but for a contract express or implied would be payable for any accommodation and includes any person occupying the accommodation as a sub-tenant". In the 1961 Act, however, the definition of tenant has been widened and Section 2(i) reads thus:

" 'tenant' means a person by whom or on whose account or behalf the rent of any accommodation is, or, but, for a contract express or implied, would be payable for any accommodation and includes any person occupying the accommodation as a sub-tenant and also, any person continuing in possession after the termination of his tenancy whether before or after the commencement of this Act; but shall not include any person against whom any order or decree for eviction has been made."

On a plain reading of the definition aforesaid it is clear that a tenant even after the termination of his contractual tenancy does not become an unauthorised occupant of the accommodation but remains a tenant. It has been pointed out by this Court in *Damadilal v. Parashram* [(1976) 4 SCC 855 : 1976 Supp SCR 645] that such a tenant is conveniently called a statutory tenant. Whether the expression aforesaid borrowed from the English law is quite apposite or not, but, what is certain is that a person continuing in possession of the accommodation even after the termination of his contractual tenancy is a tenant within the meaning of the Act and on such termination his possession does not become wrongful, until and unless a decree for eviction is made. If he continues to be in possession even after the passing of the decree, he does so as a wrongful occupant of the accommodation.

9. Mrs Seth in support of her argument rightly pressed into service a few other provisions of the Act. Section 13(1) giving protection against eviction on the ground of default in payment of rent provides therein that even after the institution of the suit if he clears off the amount of rent due within a period specified in the section and thereafter "continue to deposit or pay, month by month, by the fifteenth of each succeeding month a sum

⁵ (1977) 4 SCC 402

equivalent to the rent at that rate” calculated at the rate of rent at which he was paying earlier, no decree for eviction can be passed. **The conclusion is inevitable, therefore, that if a suit is filed on the ground of non-payment of rent after termination of the contractual tenancy, the tenant still continues to be a tenant liable to pay rent not only for the past period but in future also. In absence of a decree of eviction the person in occupation of the accommodation continues to be a tenant and is not liable to pay any damages as his occupation is not unauthorised or wrongful even after the termination of the contractual tenancy.** In Damadilal case, Gupta, J. delivering the judgment of this Court has said at p. 653 (SCC p. 864) with reference to the definition of tenant in Section 2(i) of the Act:

“The definition makes a person continuing in possession after the determination of his tenancy a tenant unless a decree or order for eviction has been made against him, thus putting him on par with a person whose contractual tenancy still subsists. The incidents of such tenancy and a contractual tenancy must therefore be the same unless any provision of the Act conveyed a contrary intention. That under this Act such a tenant retains an interest in the premises, and not merely a personal right of occupation, will also appear from Section 14 which contains provisions restricting the tenant's power of sub-letting.”

10. In Kikabhai Abdul Hussain v. Kamlakar [1974 MPLJ 485] a Bench of the Madhya Pradesh High Court seems to have opined even with reference to the 1961 Act that if a person continues to be in occupation after the termination of the contractual tenancy then on the passing of the decree for eviction he becomes a wrongful occupant of the accommodation since the date of termination. It seems a theory akin to the theory of “relation back” has been applied in the sense that if no decree for eviction is passed then the person is not in unlawful occupation but on the passing of such a decree his possession becomes unlawful not from the date of the decree but such a decree makes his occupation unlawful from the date of the termination of the contractual tenancy. Whatever could be said with reference to the provisions of 1955 Act it is clear to us that the law so enunciated by the High Court with reference to 1961 Act is not correct.

12. For the reasons stated above it is manifest that the defendants remained in occupation of the accommodation on and from January 1, 1973 as a tenant, conveniently to be called statutory tenant, under the Act. Their occupation was not unauthorised or wrongful until a decree for eviction was passed by the first appellate court on August 11, 1975. Their occupation became unauthorised or wrongful only from that date. They are not, therefore, liable to pay any damages or mesne profits for the period commencing from January 1, 1973 and ending on August 10, 1975. Decree for damages either in respect of the two months prior to the institution of the suit or for the subsequent period must therefore be set aside. The defendant-appellants will be liable to pay damages or mesne profits at the rate of Rs 125 per month (the rate of damages could not be and was not challenged before us) from August 11, 1975 only, until the delivery of the vacant possession of the accommodation.

(emphasis added)

16) In Delhi Rent Control Act, 1958 definition of the term 'tenant' under Section 2(l) included 'a person continuing in possession after termination of his tenancy'. Similarly under Madhya Pradesh Accommodation Control Act 1961 the term 'tenant' includes 'person continuing in possession after the termination of his tenancy'. Definition of 'tenant' in both the enactments seems to be similar to the one under Clause (h) of Section 5 of the Bombay Rent Act, under which 'tenant' includes any person remaining in occupation after the determination of the lease in possession'. In that view of the matter, possession of the tenant upon passing of decree for possession under Section 12 of the Bombay Rent Act becomes unlawful not from the date of determination of the lease but from the date of the decree. Thus possession of Applicants-Defendants in respect of the suit premises remained lawful till passing of the decree dated 4 September 2000.

17) Section 2(12) of the Code defines the term 'mesne profits' as under :

(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 person in wrongful possession.

18) Thus mesne profits means those profits which a person in wrongful possession of the property has actually received or could have received. Thus 'wrongful possession' is required to be established for claiming mesne profits. Since possession of the Applicants-Defendants of the suit premises till passing of the decree was not wrongful within the meaning of Section 2(12) of the Code, mesne profits could not have been directed to be paid from the date of institution of the suit. Possession of the Applicants-Defendants in

respect of the suit premises became wrongful only on the date of passing of the decree i.e. 4 September 2000 and therefore mesne profits could have been directed to be paid only from 4 September 2000 till the date of execution of the decree i.e. 20 November 2002.

19) Mr. Khandeparkar has strenuously submitted that since the decree dated 4 September 2000 directed conduct of enquiry from the date of filing of the suit, the Court conducting mesne profits enquiry acts as a Executing Court and therefore could not have gone beyond the decree. I am unable to agree. Firstly, the Court conducting mesne profits enquiry cannot be equated with that of the Executing Court. It is an independent inquiry distinct from the main decree already passed, which can be independently put to execution. Secondly, if tenant continues to be in lawful possession of the suit premises till the date of passing of the decree and if mesne profits are not recoverable in law from the date of institution of the suit, mere direction by the Trial Court for conduct of enquiry under Order 20 Rule 12(1)(c) of the Code from the date of institution of the suit would not mean that the Defendants-Judgment Debtors can be fastened with liability to pay to the Plaintiff profits earned by them or could have been earned by them during the period they remained in lawful possession of the suit premises. Since possession during pendency of suit is not wrongful, no mesne profits become payable for period prior to the date of decree even if there is a direction to determine mesne profits from date of institution of suit.

20) Even if Mr. Khandeparkar's submission of impermissibility of altering the main decree is to be accepted, the Court, upon conducting inquiry from the date of institution of suit, can always hold that mesne

profits are not payable prior to date of decree since possession was not wrongful.

21) Mr. Khandeparkar has contended that the point of impermissibility to determine mesne profits from the date of filing of the suit was never raised by Applicants-Defendants before the Trial Court. In this regard, he has taken me through the Affidavit-in-Reply filed by the Applicant-Union of India in the mesne profits application. True it is that the Applicant-Union of India apparently did not raise the issue of fixation of mesne profits from the date of institution of the suit in the Affidavit-in-Reply and mainly raised the issue about quantum of mesne profits therein. The issue however is whether Applicants can be prevented from raising the said point before this Court. In my view, liability of a tenant to pay mesne profits during pendency of suit for eviction is a point of law. Though Mr. Khandeparkar has sought to suggest that the said point of law is deeply rooted in facts, I am unable to agree with the said contention. Possession of a tenant after determination of tenancy does not automatically become unauthorised under the provisions of the Bombay Rent Act. Under Section 12(3) of the Bombay Rent Act, the tenant is entitled to pay or tender the arrears of rent on the first day of hearing of suit or on the date fixed by the Court and obviate decree for eviction on the ground of default in payment of rent. Similarly in a suit filed by landlord for recovery of possession of tenanted premises on the ground of bonafide requirement, possession of tenant cannot become wrongful till landlord proves his/her requirement and more importantly the comparative hardship. Thus the concept of possession of tenant protected by rent control legislation becoming wrongful from the date of institution of suit is unknown to law.

22) Thus, even after determination of tenancy by a landlord, tenant's possession becomes unlawful only upon passing of decree of eviction. Since possession of tenant is lawful during pendency of suit, mesne profits cannot be directed to be paid by him for his possession during continuation of the suit. Therefore, whether Applicants raised this point during the course of mesne profits enquiry or not becomes irrelevant. Once Applicants' possession in respect of the suit premises is found to be lawful during pendency of the suit, they cannot be made to liable pay mesne profits from date of filing of suit merely on account of non-raising of the said plea before the Court. If Mr. Khandeparkar's contention is accepted, the same would mean that mesne profits would become payable contrary to the definition of the term 'mesne profits' under Section 2(12) of the Code. Liability to pay mesne profits is in accordance with the provisions of law and not merely based on pleadings raised by parties. In my view, therefore irrespective of position whether Applicants raised the issue of liability for payment of mesne profits before the date of decree or not, Applicants cannot be made liable to pay the same because their possession of the suit premises till the date of passing of the decree was not wrongful within the meaning of Section 2(12) of the Code.

23) Mr. Khandeparkar has also sought to contend that even before this Court, the point of liability to pay mesne profits before the date of decree is not raised. I am unable to agree. In ground clause (e) to (h), Applicants have pleaded in the Revision Applications as under :

(e) whether both the courts below are justified in ignoring the fact that suit was filed on 29/07/1979, tenancy of the Applicants/Ori. Defendants determined only on 20/11/2002 when the decree of was eviction was passed by the Judge, Small Causes Court, Mumbai in RAE & R. Suit No. Suit No. 1429/4857 of 1979;

(f) Whether both the courts below are justified in ignoring the point of law that the Applicant/Ori. Defendants being protected tenant, and liable to pay only contractual rent and/or standard rent during the pendency of the suit as the tenancy of the Defendant determined on 20/11/2002 by eviction decree;

(g) whether both the courts below are justified in directing the Applicants/Ori. Defendants to pay mesne for period from the date of filing of the i.e. 29/07/1979 till 20/11/2002 along with 6% interest per annum;

(h) whether both the courts below are justified in not considering that application for determination of mesne profit is not execution of the decree and that the court conducting the enquiry into mesne profit has power and jurisdiction to decide for which period the Applicant/Ori. Defendant would be liable to pay the mesne profit;

24) Thus, the ground of impermissibility to direct payment of mesne profits prior to the date of decree is clearly raised in the Revision Applications.

25) It therefore held that Applicants are liable for payment of mesne profits from the date of the decree i.e. 4 September 2000 till the date of execution of the decree i.e. 20 November 2002.

26) The next issue is about the quantum of mesne profits determined by the Small Causes Court as enhanced by the Appellate Bench. It appears that the suit premises comprised of four storeyed building comprising of 36 rooms and the rooms were spread over 12,000 sq.ft. The suit premises are located in upmarket area of Mumbai City of Gowalia Tank Road (August Kranti Marg) near Grant Road Station. Considering the nature and location of the suit premises, it cannot be contended that the quantum of mesne profits fixed by the Appellate Bench is excessive so as to warrant interference by this Court in exercise of revisionary jurisdiction under Section 115 of the Code.

27) Resultantly, the Civil Revision Applications partly succeed and I proceed to pass the following order :

- (I) Order dated 3 March 2022 passed by the Appellate Bench of Small Causes Court as well as order dated 9 May 2014 passed by the Small Causes Court are set aside to the extent of direction for payment of mesne profits in respect of the suit premises from the date of filing of the suit i.e. 29 July 1979. It is directed that Applicants-Defendants shall be liable to pay mesne profits in respect of the suit premises from the date of decree i.e. 4 September 2000 till 20 November 2002.
- (II) Accordingly, Applicants-Defendants shall pay to the Respondent/Decree-holder mesne profits @ Rs.2,50,000/- per month for the period from 4 September 2000 till 20 November 2002 alongwith simple interest @ 6% p.a.
- (III) The amount representing mesne profits at the rate of Rs.2,50,000/- for the period from 4 September 2002 to 20 November 2002 alongwith 6% interest p.a. is permitted to be withdrawn by the Respondent/Decree-holder from the amount deposited by Applicants in the Small Causes Court. The balance amount shall be refunded to Applicants-Defendants alongwith accrued interest.

28) With the above directions, both the Civil Revision Applications are **partly allowed and disposed of**.

[SANDEEP V. MARNE, J.]

29) After the judgment is pronounced, Mr. Khandeparkar would request for stay of directions for refund of the deposited amount to the Applicants-Defendants. The request is opposed by the learned counsel appearing for the Applicants-Defendants. In my view, the refund is to be made to the Applicants/Defendants only after the Respondent/decreetholder withdraws the amount of mesne profits decided by this Court. The same is likely to take some time. In that view of the matter, the Applicants shall not withdraw the amount deposited in the Small Causes Court for a period of eight weeks from today.

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[SANDEEP V. MARNE, J.]