

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 328 OF 2024

Bharat Petroleum Corporation Limited

A Company incorporated under the
provisions of the Companies Act, 1956

}**Applicant**

: Versus :

1. Paramjitsingh Ghai
2. Gurmeet Kaur Ghai, w/o.
Harrjsingh Ghai
3. Paramraj Singh Ghai
4. Mrs. Surleen Kaur Dham
5. Mrs. Jasleen Kaur Arora
6. Mrs. Navleen Kaur Vijan
7. Amarjit Kaur Ghair (since deceased)
8. Jasra Singh Ghai
9. Rajleen Kaur Ghai, d/o. Manraj
Singh Ghai
10. Mr. Charanjit Singh Ghai

}**Respondents**

Mr. P.S. Dani, Senior Advocate with Mr. Roopadaksha Basu and Ms. Heenal Wadhwa i/by. The Law Point, *for the Applicant*.

Mr. Pradeep Thorat i/by. Ms. Aditi Naikare, *for the Respondents*.

CORAM : SANDEEP V. MARNE, J.

Judgment Reserved on : 1 July 2024.

Judgment Pronounced on : 8 July 2024.

JUDGMENT:-

1) Petitioner-Bharat Petroleum Corporation Ltd. has filed this Revision Application challenging judgment and order dated 28 February 2024 passed by the Appellate Bench of the Small Causes Court in Misc. Appeal No. 47 of 2023. The Appellate Bench has not reduced the quantum of mesne profits determined by the Trial Court @ Rs. 2,41,691/- per month, but has reduced the rate of interest from 10% p.a. to 6% p.a. However, the Appellate Bench has modified the direction of the Small Causes Court which had restricted payment of mesne profits till passing order dated 15 October 2022 and has directed that the same be paid till delivery of possession of the suit premises. Applicant is thus aggrieved by non-reduction of quantum of mesne profits and in granting relief to Respondents by extending the period of payment from 15 October 2022 till date of delivery of possession though Respondents had not challenged the Trial Court's Order.

2) Plaintiffs are lessees of land admeasuring 650 sq. yards equivalent to 543.48 sq.mtrs together with building, structures, driveway

etc. constructed for operation of fuel station located at City Survey No.1900 (Part), Taluka-Byculla, District-Mumbai, which is located in Agripada Area on junction of Lamington Road and Dr. Anandrao Nair Road. Plaintiffs' predecessor had executed Indenture of Lease dated 3 August 1960 in favour of Burma Shell Oil Storage and Distribution Company of India Limited (**Burma Shell**) for a period of 20 years commencing from 1 December 1957. The Government of India acquired the entire equity shareholding of Burma Shell on 24 January 1976 and the leasehold rights in respect of the land apparently vested in the Government of India. By Certificate of Incorporation issued on 12 February 1976, the name of the Company was changed to 'Bharat Refineries Ltd.' which was thereafter changed to 'Bharat Petroleum Corporation Ltd.' (**BPCL**).

3) Plaintiff issued notice dated 14 August 2004 to Defendant-BPCL terminating the tenancy and calling upon BPCL to deliver vacant and peaceful possession of the suit premises. Since the notice was not acted upon, Plaintiffs filed T.E. & R. Suit No.112/137 of 2005 in the Court of Small Causes at Mumbai for recovery of possession of the suit premises and for conduct of enquiry into mesne profits for use and occupation of the suit premises from the date of termination of tenancy till handing over possession of the suit premises. Plaintiffs also sought decree in the sum of Rs.90,00,000/- being compensation from 1 December 1997 to 30 March 2005 @ Rs.1,00,000/- per month for unlawful use and occupation of the suit premises by the Defendant. The suit was resisted by Defendant-BPCL by filing written statement. The learned Judge of the Small Causes Court

proceeded to dismiss the Suit by decree dated 19 June 2009. Plaintiffs filed Appeal No. 404 of 2009 before the Appellate Bench of the Small Causes Court challenging the decree dated 19 June 2009. The Appellate Bench allowed the Appeal by its decree dated 12 October 2010 and set aside the decree dated 19 June 2009 passed by the Small Causes Court. The Appellate Bench decreed the suit with costs and directed the Defendant-BPCL to handover vacant and peaceful possession of the suit premises before 12 January 2011. The Appellate Bench also directed conduct of enquiry into mesne profits as per the provisions of Order 20 Rule 12 (1) (c) of the Code of Civil Procedure, 1908 **(the Code)**.

4) Plaintiffs accordingly filed Mesne Profit Application No.182 of 2011 in the Court of Small Causes seeking determination of mesne profits in respect of the suit premises @ Rs.2,41,691/- per month from the date of termination of lease i.e. 14 August 2004 till handing over possession of the suit premises alongwith interest @ of 10.5% p.a. The application was resisted by Defendant-BPCL by filing reply. Both the parties led evidence. Plaintiffs examined Plaintiff No.1 as well as Mr. P. N. Powle, Government Approved Registered Valuer as their witnesses. Plaintiffs relied upon valuation of M/s. P.N. Powle & Associates which valued the mesne profits per year @ Rs.496/- per sq.ft p.a. or Rs.29,02,520/- for the entire suit premises. Defendant-BPCL examined Mr. Ajit Laxman Mane, Territory Coordinator, Mumbai and Mr. Bharat Dhaneshwar Trivedi, Government Approved Valuer who indicated mesne profits of Rs.60,617/- per month in his report.

5) After considering the evidence on record, the learned Judge of the Small Causes Court allowed the Mesne Profit Application No. 182 of 2011 by order dated 15 October 2022 and directed the Defendant to pay to the Plaintiffs mesne profits of Rs.2,41,691/- per month for the period from 14 August 2004 till passing of the order alongwith interest @ 10 % p.a. till actual realisation.

6) Defendant-BPCL filed Misc. Appeal No. 47 of 2023 before the Appellate Bench of the Small Causes Court. The Appellate Bench allowed the Appeal holding that the Small Causes Court was not justified in ignoring the evidence led by the Defendant in the form of its valuer. The Mesne Profit Application was accordingly remanded to be decided afresh by order dated 25 September 2023 passed by the Appellate Bench.

7) It appears that the order dated 25 September 2023 passed by the Appellate Bench was challenged by the Plaintiffs before this Court in Writ Petition No. 13148 of 2023. By order dated 30 November 2023, this Court held that the Appellate Court was not justified in remanding the Mesne Profit Application to the Small Causes Court and that the Appellate Bench ought to have decided the case finally in view of evidence appearing on record. Accordingly, Misc. Appeal No. 47 of 2023 filed by Defendant-BPCL was heard afresh by the Appellate Bench and by judgment and order dated 28 February 2024, the appeal is partly allowed by setting aside and

modifying the order dated 15 October 2022 passed by the learned Judge of the Small Causes Court. The Appellate Bench did not disturb the quantum of mesne profits @ Rs.2,41,691/- but directed the same to be paid till the date of delivery of possession of the suit premises by Defendant-BPCL. The Appellate Bench however reduced the rate of interest from 10% p.a. to 6% p.a. In the above manner, the Appellate Bench granted some relief to Plaintiffs in the Appeal filed by the Defendant by directing payment of mesne profits till the date of handing over of possession of the suit premises, which was restricted by the Small Causes Court only till the date of its order dated 15 October 2022. The Defendant-BPCL has however succeeded partly in the Appeal to the extent of reduction of rate of interest from 10% to 6% p.a. Aggrieved by the judgment and order dated 28 February 2024 passed by the Appellate Bench, Defendant-BPCL has filed the present Revision Application.

8) Mr. Dani, the learned Senior Advocate appearing on behalf of the Applicant has raised following six objections to the impugned judgment and order passed by the Small Causes Court and the Appellate Bench:

- (I)** That Plaintiff is not the owner of the suit premises, but merely a lessee and therefore the Plaintiffs are not in a position to monetise the suit property by sale thereof and therefore the rate of return on market value of the property could not have been a factor for determining the amount of mesne profits.

That in their capacity as lessees, Plaintiffs could, at the highest, seek payment of rental value of the suit premises towards mesne profits.

(II) That the Small Causes Court and the Appellate Bench have clearly ignored the factual position that the lease of the Plaintiff has been determined and therefore they are no longer lessees in respect of the suit premises and that they have lost right to recover mesne profits from the Defendant.

(III) The decree for recovery of possession has been granted by the Appellate Bench on 12 October 2010, on which date, the possession of the suit premises by the Defendant can be said to be unlawful. That therefore mesne profits could have been directed to be paid only from the date of decree of the Appellate Bench i.e. 12 October 2010. That the Small Causes Court as well as the Appellate Bench have erred in directing payment of mesne profits from the date of termination of lease i.e. 14 August 2004. He would rely upon provisions of Order 20 Rule 12 of the Code in support of his contention that mesne profits are payable only from the date possession becomes unlawful. That the ultimate decree for eviction is passed on 12 October 2010. That though there is merger of decree of the Small Causes Court into the decree of the Appellate Bench, there can be only one executable decree,

which in the present case, is the decree of the Appellate Bench. That decree for possession is the key, and in absence of decree for possession, mesne profits enquiry cannot be conducted. That therefore the decree passed by the Appellate Bench for recovery of possession on 12 October 2010 can only be considered as the relevant date for payment of mesne profits. That therefore direction to pay mesne profits from the date of termination of lease is contrary to the decree passed by the Appellate Bench on 12 October 2010.

(IV) That the decree passed by the Appellate Bench on 12 October 2010 was put in execution by the Plaintiffs before filing Mesne Profit Application and the execution has been obstructed by M/s. Sardar Automobiles, which has resulted in Plaintiffs taking out Obstruction Notice in the execution proceedings. The said Obstruction Notice is still pending. That the entity actually occupying the premises viz. M/s. Sardar Automobiles was not made party to the Suit and no decree has been passed against it. That instead of seeking recovery of mesne profits from entity actually occupying the premises, the Small Causes Court and the Appellate Bench have erroneously directed Defendant-BPCL to pay the same.

(V) That the Small Causes Court had directed payment of mesne profits only till the date of its order dated 15 October 2022.

That the order passed by the Small Causes Court on 15 October 2022 was not challenged by the Plaintiffs by filing Appeal or even by filing cross-objections. That therefore it was impermissible for the Appellate Bench to grant any relief to the Plaintiffs in Appeal filed by the Defendant-BPCL by directing them payment of mesne profits would be till the date of handing over of possession of the suit premises.

(VI) That the quantum of mesne profits determined by the Small Causes Court and the Appellate Bench is excessive. That the report of the Defendant's valuer had determined mesne profits of only Rs.60,617/-per month, which is reasonable considering the various factors, as well as the capacity of the Plaintiffs as mere lessees in respect of the suit premises. That Defendant's valuer had rightly determined the amount of mesne profits by taking into consideration the market value of the land as per Ready Reckoner. That the evidence of Defendant's valuer, Mr. Trivedi has been ignored by the Small Causes Court and the Appellate Bench and excessive amount of Rs.2,41,691/- is fixed towards mesne profits. That as per the Notification dated 29 August 2011 issued by the State Government inserting Regulation No.69 in the Development Control Regulations of Greater Mumbai, 1991 change of user is impermissible for redevelopment of lands used *inter-alia* for fuel stations. That thus commercial exploitation of the land is

impermissible and this factor ought to have been taken into consideration while determining the amount of mesne profits. That Plaintiffs' valuer illegally increased the Ready Reckoner value by 30% every year without any basis and further determined mesne profits by taking into consideration excessively high rate of return of 10.5% in some of the years. That the amount is thus excessive and needs to be reduced substantially.

9) Mr. Thorat, the learned counsel appearing for Respondents/Plaintiffs would oppose the Revision Application and support the order passed by the Appellate Bench. Taking me through the definition of the term '*mesne profits*' under Section 2(12) of the Code, Mr. Thorat would submit that title of the landlord to the suit property is irrelevant for determining liability to pay mesne profits. That Plaintiffs' lease is for tenure of 999 years and the Defendant cannot raise the issue of title in mesne profits enquiry after it has lost right to possess the suit premises on account of decree of the Appellate Bench dated 12 October 2010. He would submit that the Small Causes Court and the Appellate Bench have rightly directed payment of mesne profits from the date of termination of lease. That Appeal is merely continuation of the suit and therefore date of decree of Appellate Court becomes irrelevant for payment of mesne profits once possession of the suit premises is found to be unlawful. Referring to the Bombay Amendment of Rule 12 of Order 20, Mr. Thorat would submit that while passing a decree for possession, enquiry as to rent for mesne

profits has to be either from date prior to filing of suit or from the date of institution of the suit and the same can never be from the date of passing of the decree. He would submit that the Defendant-BPCL is not entitled to protection of Maharashtra Rent Control Act, 1999 and therefore its possession over the suit premises became illegal from the date of termination of lease and not from the date of passing of the decree by the Appellate Bench.

10) So far as obstruction presented for execution of the decree is concerned, Mr. Thorat would submit that the obstructionist-M/s. Sardar Automobiles is the agent appointed by Defendant-BPCL. That this position is admitted by Defendant's witness in the cross-examination. That there is specific admission that the said dealer is licensee of the Defendant-BPCL. That the Defendant continues to profiteer from the suit premises by supplying fuel to its agent/licensee operating from suit premises. That the amounts earned through the said arrangement by Defendant-BPCL are suppressed before the Small Causes Court, which left no option for the Courts below but to accept the Valuer's report for determining the amount of mesne profit. So far as quantum of mesne profits is concerned, Mr. Thorat would submit that in absence of any sale instances, the Courts below had to reply upon Ready Reckoner value and possible return on market value of the suit premises for determining the quantum of mesne profits. That the report of the Valuer relied upon by the Defendant was clearly faulty as he not only took into consideration lesser area of the plot (468.22 sq.mtrs) against the actual area of 543.48 sq.mtrs, but also

considered only 40% value of the open plot area for the purpose of determining its market value. Taking me through the Valuation Report relied upon by the Plaintiffs, Mr. Thorat would submit that the Valuer had considered 2% higher return than the deposit rates of banks only for three years in 2005, 2006 and 2007 whereafter only 1% higher return than the bank rate is considered. He would further submit that the Defendant continues to possess the suit premises and the liability to pay mesne profits continued in the year 2024 as well. However, the Appellate Bench has considered the average mesne profits payable during 2005 to 2011 resulting in payment of mesne profits depending on valuation of the suit property during the years 2005 to 2011, though mesne profits are also payable from 2012 till 2024. That therefore no interference is warranted in the quantum of the mesne profits ordered.

11) So far as the Appellate Bench improving the order passed by the Small Causes Court by directing payment of mesne profits till the date of delivery of possession in Appeal filed by the Defendant is concerned, Mr. Thorat would rely upon provisions of Order XLI Rule 33 of the Code under which the Appellate Court has necessary power to grant relief to a party which has not filed Appeal/cross-objections if the Appellate Court comes to the conclusion that the said relief ought to have been granted by the Trial Court. Mr. Thorat would pray for dismissal of the Revision Application.

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

13) As observed above, the Small Causes Court determined the quantum of mesne profits @ Rs.2,41,691/- per month and directed the same to be paid from 14 August 2004 till passing of its order i.e. 15 October 2020. There was an obvious error in the said direction of the Small Causes Court in restricting the payment of mesne profits only upto the date of its order when in fact the same ought to have been directed to be paid till the date of delivery of possession, which is the mandate under Order 20 Rule 12 of the Code. The Appellate Bench has corrected the said error committed by the Small Causes Court and has directed that mesne profits would be paid by the Defendant to the Plaintiffs till delivery of the possession of the suit premises. Mr. Dani has questioned the validity of said improvement made in the order of the Small Causes Court in absence of filing of any Appeal/cross-objections by the Plaintiffs. In my view, this objection sought to be raised by Mr. Dani has no merit in view of the provisions of Order XLI Rule 33 of the Code which reads thus :

33. Power of Court of Appeal.- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]:

Provided that the Appellate Court shall not make any order under section 35-A, in pursuance of any objections on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

14) Thus, under Order XLI Rule 33 of the Code, the Appellate Court is vested with all the necessary powers to pass any decree and make

any order which ought to have been passed or made by the Trial Court and such power can be exercised by the Appellate Court notwithstanding the fact that the Respondent in the Appeal has not filed any Appeal/cross-objections. Since there was obvious error in the direction of the Small Causes Court in restricting payment of mesne profits until the date of its order, a vacuum would have been created in respect of the period after 15 October 2022 till the possession of the suit premises are handed over by the Defendants. It is an admitted position that even as of today, the Defendant continues to possess the suit premises and is thus liable to pay mesne profits. In my view, the Appellate Court has thus obviated the need to file fresh application/proceedings for payment of mesne profits after 15 October 2022. No error therefore can be traced in the direction of the Appellate Bench for payment of mesne profits upto the date of delivery of possession of the suit premises.

15) The next submission canvassed by Mr. Dani is about Plaintiffs' lease being terminated by the owner and effect of termination of such lease on Plaintiffs' entitlement to receive mesne profits from the Defendant as well as its quantum. It appears that the notice for termination of lease is served on the Plaintiffs on 14 August 2004. The inquiry in the present proceedings is limited to determination of amount of mesne profits payable by the Defendant for its unlawful possession of the suit premises. Such inquiry has already been directed by the Appellate Bench by decree dated 12 October 2010, which has attained finality. While conducting that inquiry under Order 20 Rule 12(1)(c) of the Code, the Court cannot go

behind the Appellate Bench's decree. Also in such inquiry, the issue into title of Plaintiffs to the suit premises becomes irrelevant. In my view therefore, the issue of termination of lease of the Plaintiffs is wholly irrelevant to the inquiry into mesne profits.

16) Mr. Dani has raised the issue of liability of the Defendant to pay mesne profits from the date of termination of lease. It is contended by him that the possession of the Defendant over the suit premises became unlawful only on the date of passing of the decree by the Appellate Bench on 12 October 2010 and that therefore the direction to pay mesne profits from the date of termination of lease i.e. 14 August 2004 is erroneous. I am unable to agree. Under the provisions of Order 20 Rule 12 of the Code, the direction for inquiry as to mesne profits can be both from the date of prior to institution of the suit and from the date of its institution. Rule 12 of Order XX as amended by the Bombay High Court Amendment reads thus:

12. Decree for possession and mesne profits –

(1) Where a suit is for the recovery of possession of immovable property and for rent or *mesne profits*, the Court may pass a decree--

(a) for the possession of the property;

(b) for the rent or *mesne profits* which have accrued on the property during the period prior to the institution of the suit, or directing an enquiry as to such rent or mesne profits;

(c) directing an enquiry as to rent or mesne profits from the institution of the suit until-

(i) the delivery of possession to the decree-holder, or

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court.

(2) Where an inquiry is directed under clause (b) or clause (c) of sub-rule (1) above, a final decree in respect of the rent or *mesne profits* shall be passed in accordance with the result of such inquiry.

17) Thus under sub-rule (1) of Rule 12 of Order XX, the Court can pass decree :

- (i) for possession of the suit premises.
- (ii) for mesne profits in respect of the period prior to institution of the suit,
- (iii) inquiry into mesne profits from the institution of the suit.

18) In the present case, the Plaintiff had specifically prayed for inquiry into mesne profits from the date of termination of tenancy. Prayer clauses (b) and (c) in T.E. & R. Suit No. 112/137 of 2005 reads thus:

(b) that the Hon'ble Court may be pleased to pass an order for enquiry into the mesne profits under Order 20 Rule 12 of the C.P.C. 1908 to determine the mesne profits payable by the Defendants for use and occupation of the suit premises i.e. the premises admeasuring 650 sq.yds on piece or parcel of land bearing Site for Pump B-1014 and 1821 and C.S. No.1900 (Part) within Taluka-Byculla, District-Bombay situated at Dr. Anandrao Nair Road, Bombay from the date of termination of the tenancy till the plaintiffs recover vacant possession of the suit premises.

(c) That the defendants be ordered and decreed to pay a sum of Rs.90 lakhs to the plaintiff being the compensation from 1st December, 1993 till 30th March 2005 @ Rs.1 lakh per month being compensation of the wrongful use and occupation by the defendants of the suit premises after termination of tenancy.

19) Thus, a specific prayer was made by the Plaintiff for inquiry into mesne profits from the date of termination of lease i.e. 14 August 2004. Thus, the relief granted by the Appellate Bench for inquiry into mesne profits from the date of termination of tenancy (14 August 2004) is in tune with the provisions of Rule 12(1)(b) of Order 20 of the Code. Here, a marked difference needs to be noted between the original provisions of

Rule 12(1)(b) in the Code and the amended provisions applicable in respect of the Bombay High Court of Rule 12(1)(b). for better understanding and comparison, both the provisions are reproduced below:

Original Provision of Rule 12(1)(b)	Bombay Amendment of Rule 12(1)(b)
For the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent.	For the rent or mesne profits which have accrued on the property during the period prior to the institution of the suit, or directing an enquiry as to such rent or mesne profits.

20) Thus, the above comparison would indicate that the words ‘*mesne profits*’ have been added by Bombay High Court Amendment in Rule 12(1)(b) of Order 20, which are absent in the original provision of Rule 12 (1)(b) of Order 20. Thus, it is permissible for the Court under Rule 12(1)(b) of Order 20 to direct conduct of inquiry into mesne profits for the period prior to institution of the suit. Since there was a specific prayer for conduct of inquiry into mesne profits from the date of termination of tenancy (14 August 2004), I do not see any error in the orders passed by the Small Causes Court and the Appellate Bench determining the mesne profits and directing the Defendant to pay the same from 14 August 2004.

21) The contention that the possession becomes unlawful only on the date of passing of the decree by the Appellate Bench (12 October 2010) deserves to be rejected summarily. This is not a Rent Act suit and Defendant, being not only a Public Sector Undertaking but also having

share capital in excess of Rs.1 crore, is excluded from application of the Maharashtra Rent Control Act,1999 under Section 3(1)(b) thereof. Therefore, in the present case, the possession of the Defendant in respect of the suit premises would become unlawful not from the date of the decree of the Appellate Bench but from the date of termination of the tenancy. The Appeal is obviously continuation of the suit and therefore it would be erroneous to contend that mesne profits would be payable from the date of decree passed by the Appellate Bench. The Appellate Bench has merely directed doing of something which ought to have been done by the Small Causes Court itself. Therefore, the decree for possession passed by the Appellate Bench would date back essentially to the date of filing of the suit. One of the issues before the Appellate Bench was about the validity of termination notice dated 14 August 2004 and the Appellate Bench has held the termination of the lease by notice dated 14 August 2004 to be valid. Thus possession of the Defendant in respect of the suit premises has become unlawful from the date of termination of lease which is 14 August 2004. I therefore do not find any substance in the contention raised on behalf of the Applicants about liability to pay mesne profits only from the date of the decree of the Appellate Bench.

22) The next point raised by Mr. Dani is about pendency of obstruction proceedings on account of obstruction presented by M/s. Sardar Automobiles. I find this defence taken by the Applicant, which is a Public Sector Undertaking, having duty to act fairly, to be rather irresponsible. M/s. Sardar Automobiles is a dealer appointed by the

Defendant-BPCL. This aspect is specifically admitted by Defendant's witness in the cross-examination. The relevant portion of the cross-examination of Defendant's witness, Ajit Laxman Mane, Territory Coordinator, Mumbai, is as under:

(1) I am not aware about dismissal of suit by Order dt.19/06/2009. I am not aware about the suit is decreed by Appellate Court on 12/10/2010. According to me, the lease of the defendant over suit premises expired on 30/11/1997. It is not true to say that, defendant is liable to pay mesne profits after the lease of the defendant comes to an end. I am not agree with the claim of the mesne profit made by plaintiffs. The filling station is situated at Agripada. **The petrol pump is in possession with defendant as on date.** The dealer Sardar Automobiles has filed petition before the Hon'ble High Court and same is pending. **It is true that, the dealer is the licensee of defendant BPCL.** It is true that, defendant BPCL is the lessee of the land. **It is true that, dealer is purely doing the business as a agency of defendant.**

(emphasis added)

23) Thus, Defendant's witness has specifically admitted that defendant continues to possess the suit premises, that the dealer M/s. Sardar Automobiles is the licensee of Defendant-BPCL and that the dealer is doing business purely as an agent of Defendant. The Defendant is apparently supplying fuel to the said dealer and earning profits out of sale of petroleum products out of the said dealership. In view of this position, it is entirely irresponsible on the part of the Defendant to now seek to shift onus of payment of mesne profits on the dealer. The liability *inter se* between Defendant-BPCL and its agent/licensee (M/s. Sardar Automobiles) is a matter of contractual relation between them, with which the Plaintiffs have no concern. Plaintiffs are entitled to recover the mesne profits from Defendant-BPCL and it is for Defendant-BPCL to exercise the remedies, if available in law, against its agent/licensee.

24) M/s. Sardar Automobiles is merely a licensee or agent of the Defendant. The said dealer is occupying the suit premises and conducting business merely as an agent of the Defendant. The ultimate possession over the suit premises is that of the Defendant. There is an express admission to that effect on Defendant's part. Merely because the Agent is permitted to conduct the business of sale of petroleum products of the Defendant in the suit premises, would not make the said dealer lawful possessor of the suit premises. There is direct connection between Defendant and its agent and the Defendant is profiteering out of the arrangement of the agency with the said dealer. Therefore, filing of obstruction proceedings in respect of the said dealer is absolutely irrelevant for the purpose of determining the liability of the Defendant to pay mesne profits to the Plaintiffs.

25) I find that the conduct of the Defendant in continuing to possess the suit premises by permitting its agent/dealer to conduct the business of sale of its petroleum products, irresponsible. Being an instrumentality of the State, the Defendant has a duty to act fairly and not just contractually. In the present case, the Defendant has breached not just the contractual obligation by squatting over the suit premises despite termination of lease, but has failed to act fairly by letting its agent/dealer to conduct business from the suit premises contrary to the decree of eviction. Such conduct on the part of the Defendant is deprecated. I am therefore of the view that the Defendant is liable to pay mesne profits to

the Plaintiffs till the date of handing over of possession of the suit premises to the Plaintiffs.

26) The last issue is about the quantum of mense profits determined by the Appellate Bench. Both the Courts have fixed uniform monthly rate of Rs.2,41,691/- towards mesne profits from 14 August 2004. The Appellate Bench has directed that the said amount of mesne profits would be payable till the date of delivery of possession. According to Mr. Dani, the quantum of mesne profits determined by the Small Causes Court and the Appellate Bench is excessive and contrary to the valuation report relied upon by it, which had indicated mesne profits @ of Rs.60,617/- per month.

27) The term 'mesne profits' is defined under sub-section (12) of Section 2 of the Code 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.

28) Thus, mesne profits in respect of the property means those profits which the person in wrongful possession thereof actually received or might with ordinary diligence, have received together with interest on the said profits. Thus, what is earned by the Defendant after the date of termination of lease (14 August 2004) becomes mesne profits in respect of

the suit premises in the present case. The Defendant is a Public Sector Undertaking and has been operating a retail fuel outlet in the suit premises through its dealers/agents. The Defendant is thus in possession of the necessary accounts of profits earned through sale of fuel and/or towards agency/license fees by it from the fuel station in the suit premises from 14 August 2004 onwards. However, Defendant has chosen to suppress the said information, though the same is not only available with it, but could have been easily produced before the Small Causes Court or even before the Appellate Bench during the course of inquiry into mesne profits. This would have been the best evidence for deciding the quantum of mesne profits payable by the Defendant to the Plaintiffs. However, for reasons best known to the Defendant, it chose to withhold the said information. The Appellate Bench has rightly criticized the Defendant for having withheld the vital information with regard to the profits earned by it on account of possession of the suit premises after 14 August 2004. The Appellate Bench has rightly drawn adverse inference against the Defendant under the provisions of Section 114(g) of the Indian Evidence Act.

29) On account of failure on the part of the Defendant to disclose the amount of profits actually earned by it through operation of fuel station at the suit premises through its dealers during the relevant time, parties were required to lead evidence with regard to the valuation of the suit premises and about return on that valuation or rentals receivable therefrom. Conduct of inquiry into mesne profits by considering value of

the suit property is directly attributable to the conduct of the Defendant who suppressed the information relating to the actual profits earned by it by operation of fuel station at the suit premises after 14 August 2004.

30) Coming to the exercise of determination of amount of mesne profits based on valuation of the suit premises, it appears that initially the Small Causes Court had proceeded to rely solely on the valuation report submitted by the Plaintiffs and fixed mesne profits @ Rs.2,41,691/- per month. The Appellate Bench set aside the order dated 15 October 2022 and remanded the mesne profits application for fresh inquiry to the Small Causes Court. This Court, however directed that the Appellate Bench should have conducted the said exercise itself rather than making an order of remand. This is how the Appellate Bench has taken into consideration the valuation reports submitted by the Plaintiffs as well as by the Defendant for determining the quantum of mesne profits payable in respect of the suit premises. Plaintiffs relied upon valuation report of M/s. P.N. Powle & Associates. The report is prepared by the said valuer by taking into consideration the rate of land on the basis of Ready Reckoner Rates during the years 2005 to 2011, which varied from Rs.31,500/- (2005) to Rs.65,900/- (2011). The said valuer thereafter considered the fact that the value of commercial plots is usually higher than the plots for use of other purposes and accordingly enhanced the value by adding 30% increment. The value per sq. mtrs thus increased by 30% each year at Rs.40,950/- (2005) to Rs.85,670/- (2011). This is how the value of the

plot admeasuring 543.48 sq. mtrs was indicated by the said valuer as under :-

SR.NO.	YEAR	VALUE OF PLOT
1	2005	Rs.2,22,55,506/-
2	2006	Rs.2,36,95,728/-
3	2007	Rs.2,45,97,905/-
4	2008	Rs.3,03,09,880/-
5	2009	Rs.3,03,09,880/-
6	2010	Rs.3,71,03,380/-
7	2011	Rs.4,65,59,932/-

31) The valuer of the Plaintiffs thereafter took into consideration the bank deposit rates prevalent during the years 2005 to 2011 and added increment of 2% or 1% to the said rate ranging between 7.25% (2005) to 10.5% (2011) was applied to the above value of the plot and the interest receivable in respect of the plot was determined as under :

SR.NO	YEAR	INTEREST AMOUNT PER ANNUM
1	2005	Rs.2,22,55,506/- x 7.25% =Rs.16,69,163/-
2	2006	Rs.2,36,95,728/- x 8.5% = Rs.20,14,137/-
3	2007	Rs.2,45,97,905/- x 8.5% = Rs.20,90,822/-
4	2008	Rs.3,03,09,880/- x 9.5% = Rs.28,79,434/-
5	2009	Rs.3,03,09,880/- x 9.5% = Rs.28,79,434/-

6	2010	Rs.3,71,03,380/- x 10.5% = Rs.38,95,855/-
7	2011	Rs.4,65,59,932/- X 10.5% = Rs.48,88,793/-
	TOTAL	Rs.2,03,17,638/-

32) The valuer thereafter determined the average return on investment per annum at Rs.29,02,520/- which translates into Rs.2,41,876/- per month.

33) The Defendant on the other hand relied upon valuation report of Mr. Bharat Dhaneshwar Trivedi. The Defendant's Valuer erroneously reduced the area of the plot from 543.48 sq.mtrs to 468.22 sq.mtrs by adopting erroneous analogy that *'However, we also understand that Late Mr. Keharsing Dayalsingh Giani (Lessor of land to Burmah Shell) had obtained an area of only 560 sq.yd on sublease from M/s. Kassum Keshavjee & Co. on 27/1/1948.'* In my view, there is no basis for this understanding of Defendant's Valuer as the suit premises was described as admeasuring 650 sq.yds in the suit, which position remained undisputed till passing of decree for possession. Therefore reduction of area of plot from 650 sq.yds (543.48 sq.mtr) to 560 sq.yd (468.22 sq.mtr) by Defendant's Valuer is erroneous.

34) Defendant's valuer also took into consideration the Ready Reckoner rates for the period between 2005 to 2011 and has more or less accepted the same rates as indicated in the report of the Plaintiffs' Valuer after adding 30% increment each year. This is clear from the following :

YEAR	RATE PER SQ.MTS	RATE OF OPEN LAND IN RS. x 1.30 TIMES
2005	Rs.40,950/-	41,080/-
2006	Rs.43,600/-	43,160/-
2007	Rs.45,240/-	45,240/-
2008	Rs.55,770/-	55,640/-
2009	Rs.55,770/-	55,640/-
2010	Rs.68,270/-	61,230/-
2011	Rs.85,670/-	85,670/-

35) The Defendant's Valuer thereafter determined average Ready Reckoner rate of Rs.55,380/- per sq.mtr for the period 2005 to 2011. The folly committed by the said Valuer is by considering only 40% of the above rate of Rs.55,380/- per sq.mtr in respect of the open land around the structure. The said valuer has indicated in his report as under:

As per Ready Reckoner provisions, land rate for open land around the structure is considered as 40% of the rate applicable to the developed land in that zone.

36) The Defendant's valuer thereafter bifurcated the area of plot of 468.22 sq.mtr (which itself was erroneous) into constructed area of 49.70 sq.mtrs and open land of 418.52 sq.mtrs. He applied the rate of Rs.55,380/- to the constructed area but applied only 40% of Rs.55,380/- (Rs.22,152/-per sq.mtr) to open land of 418.52 sq.mtr. This is how, he determined the average market value of the land at Rs.1,21,23,358/- as under:

For the Period 1/6/2005 to 31/12/2011				
	Area of the plot	Average rate of open land per sq.mtr (FSI 1.00)	FSI utilized	Valuation
Land Valuation	468.22 sq.mtr	55,380/-	0.11	28,52,303/-
Open land around the structure (468.22 sq.mtr – 49.70 sq.mtr)	418.52 sq.mtr	40% of 55,380/-	--	92,71,055/-
			TOTAL	Rs.1,21,23,358/-

37) In my view, the Defendant's Valuer committed multiple errors in his Valuation Report. Firstly, he took into consideration erroneous area of the plot. Secondly, he erroneously considered only 40% of the Ready Reckoner rate for open land ignoring the fact that the Ready Reckoner rate for open land only was taken into consideration. This is how he determined erroneous value of the plot at Rs.1,21,23,358/-.

38) The suit premises, being a plot of land on which fuel station is operated is located in the heart of Mumbai City on the junction of Lamington Road and Dr. Anandrao Nair Road opposite of Agripada Police Station. It is impossible to believe that the plot admeasuring 543.48 sq.mtrs (5847 sq.ft) in the heart of Mumbai City could be purchased during the years 2005 to 2011 at Rs.1.21 crores. In my view, therefore taking judicial note of astronomical high rate of Real Estate in the Mumbai City, the valuation of Rs.1.21 crores indicated by the Defendant's valuer is grossly incorrect and deserves to be outrightly rejected. On the contrary, the valuation of Rs.2.22 crores in the year 2005 and Rs.4.65 crores in the year 2011 indicated by the Plaintiff's valuer appears to be more reasonable and in consonance with the Real Estate value in Mumbai city at the relevant period.

39) Coming to the rate of return/interest applied by the Plaintiffs' valuer, it appears that the said valuer added interest of 2% at the bank's interest rate applicable during the relevant time. However, additional 2% increment appears only during the years 2005-2007 and increment of only 1% is added during the years 2008-2011. This is clear from the following :

SR.NO.	YEAR	RATE PER INTEREST PER ANNUM
1	2005	7.25% AGAINST BANK RATE-5.25%
2.	2006	8.5% AGAINST BANK RATE-6.5%
3.	2007	8.5% AGAINST BANK RATE-6.5%

4.	2008	9.5% AGAINST BANK RATE-8.5%
5.	2009	9.5% AGAINST BANK RATE-8.5%
6.	2010	10.5% AGAINST BANK RATE-9.5%
7.	2011	10.5% AGAINST BANK RATE-9.5%

40) Though, it may appear that the return of 10.5% on value of commercial property in the year 2011 is slightly on the higher side, what needs to be borne in mind is the fact that the Small Causes Court and the Appellate Bench have not increased the amount of mesne profits after the year 2011. The mesne profits @ Rs.2,41,691/- is kept uniform from 14 August 2004 till the date of delivery of possession. It needs to be judicially noticed that after the year 2011, the real estate rates in Mumbai city have increased substantially and if the exercise of determining mesne profits after the year 2011 on the basis of valuation was to be continued till the year 2024, the amount of mesne profits payable in respect of the suit premises would be way higher than Rs.2,41,691/-. In that view of the matter, I am not inclined to interfere in the amount of mesne profits determined by the Small Causes Court and confirmed by the Appellate Bench.

41) Thus all the points sought to be urged on behalf of Defendant-BPCL are devoid of merits. The Order passed by the Appellate Bench is unexceptionable.

42) Resultantly, the Civil Revision Application filed by Applicants fails and is dismissed as such. There shall be no order as to costs.

SANDEEP V. MARNE, J.

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