

(1987) 01 MAD CK 0062
In the Madras High Court

Haridas Girdhardas (Died) and Others	APPELLANT
Vs	
V. Sivarama Subramanian and Others	RESPONDENT

Date of Decision : 28-01-1987

Acts Referred:

Citation : (1989) 1 LW 184 : (1989) 1 MLJ 313

Hon'ble Judges : V. Ramaswamy, J; V. Ramaswami, J

Bench : Division Bench

Judgement

V. Ramaswamy, J.—This is an appeal by the plaintiffs against the judgement and decree in C.S. No. 28 of 1964 on the file of this Court determining the mesne profits in relation to the suit property at Rs. 6,250 per month. The claim of the plaintiffs was at the rate of Rs. 12,000 per month.

2. The litigation had a chequered career. But suffice it to note a few of the facts which are necessary for the necessary for the disposal of this appeal. The plaintiffs originally filed this suit praying for a declaration that they have become the owners of the building and the superstructure constructed by the defendants on the lands leased by them to the defendants in terms of the lease deed dated 17th November, 1938. Ultimately, the prayer in the suit was amended as one for specific performance and for a direction to the defendants to execute and register a deed vesting the building and the superstructures on the site let out by them, and for a direction to deliver to the plaintiffs the site along with the building in good and satisfactory condition. The plaint was also amended with a prayer for a direction to the defendants to pay the plaintiffs Rs. 12,000 per month as and by way of mesne profits for use and occupation of the building and the superstructure built upon the site from 4th August, 1968 till possession is handed over to the plaintiffs. There is no dispute that possession was handed over on the 24th of March, 1974, and the claim for mesne profits thus is for the period from 4th August, 1968 to 24th March, 1974.

3. In this appeal, the learned Counsel for the appellants raised a number of contentions. The learned Counsel first contended that though in the plaint the

plaintiffs had prayed for mesne profits at the rate of Rs. 12,000 per month for use and occupation of the building and the superstructure built on the demised premises, there was no specific denial of the quantum of mesne profits payable in the written statement or in the additional written statement filed by the defendants and therefore, the plaintiffs are entitled to proceed on the basis that the defendants had admitted the quantum by non-denial and therefore the learned Judge was in error in reducing the mesne profits claimed to Rs. 6,250.

4. In this connection, the learned Counsel relied on the provisions of Order 8, Rule 5 of the CPC and the decision of the Judicial Commissioner of Bhopal reported in *Gangaram Nathuram v. Beharilal Brijlal* AIR 1952 Bhopal 39. We are of the view that no question of law arises in the case as factually there is no basis for this contention that there was no denial of the quantum of mesne profits. As already stated, the suit as originally filed was for a declaration that the plaintiffs as and from 1st March, 1964 became the owners of the building and the superstructure constructed by the defendants on the land leased to them according to the terms of the lease deed dated 17th November, 1938. There was a further prayer for a direction to the defendants to pay rent for the building and the superstructure for the period from 1st March, 1964 at the rate of Rs. 12,000 per month. In the written statement filed, the defendants specifically denied their liability to pay the rent in addition to contending that the plaintiffs were not entitled to the declaration as prayed for. They were also contending that the plaintiffs were not entitled to claim "any amount" as rent for the building. Though the plaintiffs amended the prayer as per the order of the Supreme Court on 4th August, 1968 including a prayer for mesne profits, no specific averments were made in the plaint as to their entitlement for mesne profits on the basis on which that amount at Rs. 12,000 was claimed. In the circumstances, there was actually no need for filing any written statement traversing the allegations relating to the quantum of mesne profits.

5. However, we may mention that when the matter was pending before the Supreme Court, there were affidavits and counter affidavits relating to mesne profits, the plaintiffs claiming before the Supreme Court mesne profits at the rate of Rs. 15,000 per month and the defendants asserting that they are not liable to pay more than Rs. 5,000 per month as mesne profits. In the circumstances, therefore, it could not be stated that the defendants at any time had agreed to pay Rs. 12,000 per month, and it is also not possible to contend that there was an implied admission within the meaning of Order 8, Rule 5 of the CPC in this case. Though theoretically no exception could be made to the principle laid down in the decision in *Gangaram Nathuram v. Beharilal Brijlal* AIR 1952 Bhopal 39, if there is no specific denial of the quantum of profit, normally it can be taken that the matter is admitted subject to the condition mentioned in Order 8, Rule 5 of the Code of Civil Procedure. Since there is no factual basis for this submission, we are unable to agree with the contention of the learned Counsel.

6. It was then contended by the learned Counsel that in previous proceedings, in

respect of the same property, the defendants had admitted that the income from the property was much more than Rs. 12,000 and that they are bound by that statement, and accordingly the plaintiffs are entitled to the decree at the rate of Rs. 12,000 per month as prayed for. The prior proceedings referred to by the learned Counsel are in C.S. No. 112 of 1960. That was a suit filed by the first defendant against his sub lessee in which he has claimed mesne profits at the rate of Rs. 18,700. In respect of this claim, he gave evidence and that evidence is relied on by the learned Counsel. However, we may mention that if we have to take the evidence on record, we have to take the entire evidence and as seen from the cross examination, most of the contentions relating to the calculation and arriving at the figure of Rs. 17,000 were given a go-by, and in fact, the learned Judge who decided that case ultimately fixed the mesne profits at Rs. 2,650 per week which works out to Rs. 11,483 per month. It should also be noted that mesne profits was fixed for the theatre as a going concern, that is, for the land, building, furniture, machinery, lightings and all other amenities including the goodwill of the theatre. Certainly in this case as seen from the plaint prayer itself, the mesne profits claimed was "for use and occupation of the building and superstructures built upon the demised premises" and not for a cinema theatre as a going concern with all machinery furnitures, etc. as stated above. Therefore, that amount of Rs. 11,483 fixed thereunder could not form the basis for the claim made in this case.

7. The learned Counsel in this connection relied on the decision of the Bombay High Court reported in D.S. Mohite v. S.A. Mohite AIR 1960 Bom.153. The ratio of that judgment has been clearly brought out in head note and therefore we may usefully extract the head note as under:

It is not correct to say that an admission of a question of fact made by a party in the course of a proceeding has in another proceeding no value whatever and cannot be regarded as a good piece of evidence relying on which the opposing party may contend that the claim made in the subsequent proceeding is unjustifiable. The court is certainly entitled to consider admissions some only made by party in the course of proceedings in other suits relating to the same subject matter.

The legal proposition given as such need not be taken any exception to. But there is no basis for applying that decision in this case. As already stated, there is nothing as an admission to rely upon in the proceedings in C.S. No. 112 of 1960.

8. The next submission of the learned Counsel for the appellants was that for determining the mesne profits, the test to be applied was not what the plaintiff had lost, but what the defendant had gained by reason of his illegal possession. The further submission was that in the light of this proposition, the burden is actually on the defendants to prove what they have gained or made out of their possession by producing the best evidence in their possession, and if they had not discharged that burden, the plaintiffs in effect are entitled to the decree as

prayed for. No exception could be taken to the proposition that normally the test to be applied for determining the mesne profits by reason of the specific definition in Section 2(12) of the Code of Civil Procedure, is not what a person has lost by his exclusion, but what the trespasser has gained or might reasonably have made by his wrongful possession. That is a well settled proposition, and if any authority is needed, reference may be made to the decision of the Privy Council in AIR 1930 82 (Privy Council) , and of the Supreme Court in Fateh Chand Vs. Balkishan Das, . But the real question for consideration is whether the defendants are bound to prove the profits which they have actually made and what are the rights of the plaintiffs if they had not produced any evidence with regard to the same. We are of the view that the suit for mesne profits is a suit really in the realm of damages, and as in all cases of suit for damages, the primary duty is on the plaintiff to prove the actual damages suffered by reason of the wrongful action of the defendant. Though this rule also cannot be put as absolute in terms especially when all the facts relating to the ascertainment of damages are within the exclusive knowledge of the defendant, each case will have to be determined with reference to the facts of that case. If the defendant had specifically taken a plea that he has received only a particular amount as income and that was the normal income that could have been expected reasonably as a return, then the burden is on him to establish it. But that also does not mean that the plaintiff is bound to accept only that amount which is mentioned as a return. But the plaintiff can always establish that the normal return from a property received by a prudent user of the same would have been much more than what actually is claimed as an income disclosed by the defendant. If the income disclosed by the defendant is accepted by the plaintiff, there is no further question arising. But if the plaintiff is not accepting that as a correct return, then it is for him to show what actually would be the reasonable return from the property for which he would be entitled to a decree. In fact, this is the principle that has been laid down in the two decisions reported in Dhanarajagerji v. Parthasarathy 38 L.W. 715 : A.I.R.1933 Mad.825 and Mohamed Abdul Gaffur Rowther v. Muhammed Samsuddin Rowther AIR 1925 Mad. 297. In Dhanarajagerji v. Parthasarathy 38 L.W. 715 : AIR 1933 Mad. 825, with respect to the burden of proof, the learned Judges made the following observations:

Some question has been raised as to the onus of proof, but in the circumstances of this case, any discussion as to the onus seems unnecessary. Defendant 4 has put forward a specific case, that owing to certain reasons he was not in a position to collect the full rentals and has failed to make it out. But I may state that in my opinion the true rule as to the onus of proof is, when a party claims damages, he must adduce proof in support of his claim. The burden of proof rests in the first instance upon him; in order to succeed he must put the court in possession of satisfactory evidence as to the quantum of damages to which he entitled. The claim for mesne profits is virtually a claim for damages, and the rule that the plaintiff must discharge the burden applies therefore to such a claim. But the expression "mesne profits" is defined in Section 2, Clause 12, CPC as meaning

not only those profits which a person in wrongful possession actually received, but also such profits as he might with ordinary diligence have received. If the defendant asserts that a particular amount and no more was received by him, the duty of establishing it affirmatively rests upon him, that fact being especially within his own knowledge (Section 106, Evidence Act). On his laying before the courts sufficient evidence to prove that fact, he shifts the burden to the opposite party of proving that more might have been received. This is the effect of *Ramakka Vs. V. Nagesam*, , on which both sides have relied.

The learned Judges also noticed the decision reported in *Muhammad Abdul Gaffur Rowther v. Muhammad Samsuddin Rowther* AIR 1925 Mad.297, and held that it does not lay down a different rule.

9. In this case, as already stated, the defendant had not made any specific plea about the income derived from the property. However, they produced evidence by marking Income Tax returns and orders relating to the period as the income received which showed far less than what was given by the learned Judge as mesne profits in this case. The learned Counsel relied on the decision in *Hiralal and Others Vs. Badkulal and Others*, , and also the decision in *Murugesan Pillai v. Manicka Vasaga Desika Gnanasambanda Pandora Sannadhi* 40 Mad.402, and contended that the parties to a suit should bring before a court the best evidence and when it is not produced, the court is justified in concluding that it would, if brought before the court, not support the case of the party omitting to produce it. But in fact, the learned Counsel went further and contended that not only we should infer that if they had produced the proper evidence, it would have gone against them, but also we should preclude them from relying on any evidence in the case in support of their contention if they had failed to produce the best evidence in this case. According to the learned Counsel, producing the income tax returns or the assessment orders thereon are not enough to show what they had received as income from the property; but they should have produced the entire accounts relating to the business of Globe Theatre, and that only could be considered as the best evidence. In the absence of production of those records, they are not entitled to rely on the income tax returns or the other evidence produced relating to the other theatres nearby showing the normal income from such type of cinema houses.

10. First of all, we are unable to agree with the learned Counsel that the income tax return and assessment orders are not proper or best evidence relating to the income from the property. The income tax returns produced in this case specifically show the income from the Globe Theatre separately. The income was tested and assessed by the income tax officer after disallowing certain items of expenditure and therefore prima facie that should be taken as the evidence of the income from the property, and it is not necessary for the defendants to produce the account books relating to the theatre showing the actual income derived from it. Apart from this, we have to notice that the plaintiffs have not summoned the production of the accounts from the defendants, if they wanted at

any time not to rely on the income tax returns or the assessment orders made thereon. In the circumstances, therefore, there was no duty cast on the defendants to produce the account books in addition to the assessment orders in this case.

11. That leads us to the question as to the actual evidence available in this case and how the order of the learned Judge fixing the quantum is reasonable and could not be interfered with. The plaintiffs relied on the evidence of P.W.1, a receiver appointed by this Court in respect of a theatre by name Gaiety Talkies which is also situate in Mount Road round about the locality where the plaintiffs' theatre is situate. On the side of the defendants, evidence was produced relating to three theatres which are also round about that locality, namely, Plaza Talkies, Odeon Theatre and Chitra Talkies. The learned Judge has rejected the income derived from Plaza Talkies and Odeon Theatre as not a reliable data, but relied on the income derived from Chitra Talkies as the basis for his decision. The learned Judge has rejected the evidence relating to the profits derived from Gaiety Talkies. In respect of Gaiety Talkies, P.W.I, the receiver has stated that the net income from the theatre would be between Rs. 12,000 and Rs. 13,000 a month. But it is seen from the evidence as also the other particulars available in this case that the amount derived was from a cinema theatre as a going concern and it is not with reference to any income derived from the land and the building and superstructure built on the landlord, for which alone the plaintiffs are entitled to and for which alone the plaintiffs have made a claim, though the learned Counsel for the appellants sought to make out that they may be entitled to consider the entire income from the theatre as a going concern. The plaintiffs are not the owners of the machinery or the furnitures and fixtures nor the goodwill in relation to the theatre and therefore any income derived in respect of the user of the same could not be taken into account for the purpose of determining the mesne profits. It is also seen that the seating capacity of Gaiety Talkies is 878 whereas the seating capacity of Globe Theatre is only 769. In the circumstances, the rejection of the evidence relating to Gaiety Talkies for determining the quantum of mesne profits is unassailable. Chitra Talkies which is also situate in Langs Garden Road in Mount Road area is also run on lease basis. It is seen from Exs.C-1 dated 25th May, 1956 and the oral evidence of the lessor that the land and the building were leased for a monthly rent of Rs. 2,700 and there was a separate agreement for hiring the furniture at the rate of Rs. 525 per month. There were very many renewals and under Exhibit C-5 dated 1st June, 1965 it was renewed for the period from 1st June, 1969. In this document, a sum of Rs. 3,725 is shown as the ground rent for the land and Rs. 3,000 as hire charges for the furnitures. Thus, we have the evidence which show that for the land and the building for this cinema theatre, approximately for the period for which we are also concerned, the lease amount was Rs. 4,000 and Rs. 3,000 was for the furniture. The learned Judge was not willing to accept the apportionment of the total rent of Rs. 7,000 received in this case as correct and that the rental for the furniture was a little high and in that view he fixed the hire charges for the

furniture at Rs. 750 and deducting this Rs. 750 from the total amount of Rs. 7,000, the learned Judge arrived at the figure of Rs. 6,250 per month as the lease amount for the land and the building. Though there is nothing to suggest that Rs. 3,000 fixed for the furniture was excessive, we do not want to interfere with the order of the learned Judge especially when the respondents had not questioned the same. D.W.1 has also given evidence which corroborated the recitals in the document Exhibit C-5. The learned Counsel for the appellants could not suggest any ground as to why we should not accept this evidence relating to the income received from Chitra Talkies. It is also seen that the seating capacity of Chitra Talkies is 921 whereas in Globe Theatre it was only 769. Therefore, the rental paid for that theatre must be higher than what is paid or payable for Globe Theatre. Having regard to all these factors, we accept the finding of the learned Judge that the fair and reasonable amount of mesne profits in respect of the suit theatre site and building could be fixed at Rs. 6,250 per month. We accordingly confirm the finding of the learned Judge and dismiss the appeal with costs.