

(2008) 04 BOM CK 0030

In the Bombay High Court

Case No : Chamber Summons No"s. 1539 of 2006 and 1820 of 2007 in Suit No. 1996 of 2006

Humayun Dhanrajgir and Others

APPELLANT

Vs

Ezra Aboody

RESPONDENT

Date of Decision : 23-04-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2(12)

Citation : (2008) 6 BomCR 862

Hon'ble Judges : Daga V.C., J

Bench : Single Bench

Advocate : I.M. Chhagla, J.P. Sen and Sharan Jagtiani, instructed by Federal and Rashmikant, for the Appellant; D.H. Mehta and Chirag Balsara, instructed by Daru Shah and Co., for the Respondent

Judgement

Daga V.C., J.—Both chamber summonses are directed against the order passed by the Court Receiver dated 30th November 1980 fixing monthly royalty at the rate of Rs. 3,70,000/- in respect of the premises being Flat No. 34/34-A in Block-F, Dhanraj Mahal, situated at C.S.M. Road, Appollo Bunder, Mumbai 400 039 (hereinafter referred to as "the suit property"), around which the entire dispute revolves.

FACTUAL MATRIX

2. The factual matrix reveals that on 1st March, 2002, inter alia; two agreements were entered into between the plaintiffs and the defendant of which one was leave and licence agreement. By the said agreement, the defendant was permitted to occupy the suit property/flat as a licensee for three years. By the other agreement of the same date, an option to purchase the said suit property/flat was given to the defendant. The said agreement, inter alia; provides the time by which the option to purchase could be exercised by the defendant. The defendant claims to have exercised the said option after expiry of 18 months of the leave and license agreement and before six months therefrom, vide letter

dated 23rd August 2004. On the other hand, plaintiffs contend that the defendant was not entitled to exercise the said option due to breaches committed by him.

3. According to plaintiffs, breaches committed by the defendant were communicated by them to the defendant vide letter dated 2nd September 2004. According to the plaintiffs, by their letter dated 2nd September, 2004 they allowed the defendants to exercise the said option, subject to compliance of the terms and conditions mentioned therein. Plaintiffs are alleging breach of the said terms and conditions contained in the letter dated 2nd September, 2004.

4. The correspondence ensued between the parties shows the various differences between them. Plaintiffs, therefore, filed a suit seeking declaration that no valid option was exercised by the defendant to purchase the suit premises and also sought possession of the suit property with a prayer to grant and determine mesne profit.

5. The plaintiffs, in the suit, took out Notice of Motion No. 2259/2006 praying for appointment of the Court Receiver and restraining the defendant from parting with possession of the suit premises in favour of any third party. The defendant contested the notice of motion by filing his affidavit-in-re-ply. Learned Single Judge (Shri S.K. Shah, J.) (as he then was) vide his order dated 1st September, 2006 was pleased to make the notice of motion absolute subject to the terms and conditions recorded therein.

6. Not satisfied with the above order an appeal was filed by the defendant before the learned Division Bench. The learned Division Bench vide its order dated 9th October, 2006 was pleased to affirm the order passed by the learned Single Judge dated 1st September, 2006 appointing the Court Receiver; however with slight modification. 7. The learned Division Bench permitted the Court Receiver to take formal possession of the suit premises from the defendant and allowed the defendant to remain in de facto possession of the suit premises as agent of the Court Receiver subject to the fixation of the monthly royalty by the Court Receiver. The defendant was directed to deposit Rs. 1 crore with the Registry of this Court, out of which Rs. 50 lakh were ordered to be kept as security with direction to invest the same in fixed deposit with any nationalised Bank by the Court Receiver and remaining Rs. 50 lakh, after adjusting the amount of Rs. 12 lakh which were already lying with the plaintiffs by way of security deposit, were allowed to be paid to the plaintiffs calculated @ Rs. 1,30,000/- per month from October, 2003 till 31st January, 2006 towards use and occupation of the suit premises by the defendant. The tentative royalty @ Rs. 1,30,000/- for November, 2006 and subsequent months, until final determination of the royalty/ monthly compensation by the Court Receiver, was permitted to be paid to the plaintiffs until balance amount of Rs. 50 lakhs is exhausted.

DETERMINATION OF ROYALTY

8. The Court Receiver pursuant to the aforesaid order of the learned Division

Bench initiated proceedings to determine the amount of monthly royalty of the suit premises.

The Court Receiver appointed one M/s. S.S. Joshi & Associates as Valuers and on 28th November, 2006, the said Valuer submitted its valuation report, and determined yield of the property in the sum of Rs. 3,70,865/- per month, which was received by the Advocate for the parties on 28th November, 2006. The Court Receiver vide its order dated 29th November, 2006 fixed the monthly royalty at Rs. 3,70,000/- and settled the draft of the agency agreement.

RIVAL CHAMBER SUMMONSES:

9. Being aggrieved by the order of the Court Receiver dated 29th November, 2006, the defendant has taken out chamber summons No. 1539 of 2006 contending that the valuation of suit property made by the Valuer is very high and that the amount of royalty fixed is unreasonable for the reasons set out in the affidavit dated 1st December, 2006 filed in support of the motion. The defendant has thus prayed for setting aside the report of the valuer dated 28th November, 2006 as well as order of the Court Receiver dated 29th November, 2006.

10. The above chamber summons is opposed by the plaintiffs contending that the amount of royalty fixed by the Court Receiver is on lower side and that it needs to be enhanced.

The plaintiffs have also taken out Chamber Summons No. 1820/2006 praying for directions to the Court Receiver to cause fresh valuation of the suit premises for the purposes of determining correct amount of monthly royalty and, in the alternative, prayed for directions against the defendant directing him to execute fresh agency agreement in respect of the suit premises for a period of 11 months commencing from 1st October, 2006 at monthly rent of Rs. 6 lakh, with a direction to pay service tax thereon at the prevailing rate as per Finance Act, 2007.

11. The reliefs claimed in both the aforesaid chamber summonses are running counter to each other though the facts are identical, hence they were heard together and are being disposed of by this common order.

RIVAL SUBMISSIONS

12. Learned Counsel for the defendant urged that the valuation made by the Valuer M/s. S.S. Joshi & Associates is on the higher side. According to him, it does not take into account the actual rates prevailing in the locality in which the suit property is situate. He further submits that the valuer has measured the suit property as 2,477 sq.ft. as per the agreement and that the consideration was fixed at Rs. 9,500/- per sq.ft. He, thus submits that on proper calculation, the total consideration for the suit property works out in the sum of Rs. 2,00,31,500/-. Out of that Rs. 1 crore has already been deposited by the defendant, leaving the balance of Rs. 1,00,31,500/-. Thus, the amount of

monthly royalty ought to have been fixed in the sum of Rs. 1,12,776/- at 10% return. He further submits that the Court Receiver has valued the property on the basis of market value method, whereas the valuation should have been fixed by adopting rental value method.

13. According to him, the suit property is leasehold since the Port Trust is the head lessor and plaintiffs are the lessees and the nature of transaction is that of sub-lease. He further submits that the Court Receiver has fixed the royalty on the basis of the valuation report dated 28th November, 2006 for which no objections were invited with the result, defendant did not get any opportunity much less reasonable opportunity to object to the report of the valuer. According to him, bare perusal of the report indicates that the valuation of property is not based on correct principles. As such, the valuation done is in utter violation of the principles of natural justice and fair play and that the same is liable to be set aside.

14. Per contra, Mr. Chhagla, learned Senior Counsel for plaintiffs strongly opposed the submissions canvassed on behalf of the defendant. He urged that by no stretch of imagination, the valuation made by the Valuer could be said to be improper. He further points out that out of Rs. 1 crore, Rs. 50 Lac have already been exhausted having used the said amount for payment of arrears and monthly interim royalty as per the directions given by the learned Division Bench vide its order dated 9th October, 2006. He further submits that so far as balance amount of Rs. 50 Lac is concerned, the said amount is lying in a fixed deposit as ordered by the Division Bench and hence the said amount is not available for the benefit of the plaintiffs. He, thus, submits that the deposit of Rs. 1 crore was rightly excluded from consideration while determining the amount of royalty. He, thus, prayed for dismissal of Chamber Summons No. 1539/2006 taken out by the defendant and went on to press in service Chamber Summons No. 1820/2006 taken out by the plaintiffs praying for fresh valuation report and fixing the monthly royalty in the sum of Rs. 6 lakh. This chamber summons was opposed by learned Counsel for the defendant, adopting the very same submissions advanced in support of Chamber Summons No. 1539/2006 taken out by the defendant.

15. During the course of rival submissions, an attempt was made by both Advocates to canvass various principles on which the amount of royalty could be fixed.

ISSUES FOR CONSIDERATION

16. The rival submissions have given rise to the following issues for consideration:

(A) What should be the basis for determining the amount of monthly royalty?

(B) In the facts and circumstances of the case, whether the order passed by the Court Receiver determining monthly royalty in the sum of Rs. 3,70,000/- is legal, valid and proper ?

CONSIDERATION

17. Having heard rival parties, before touching the merits of the issues framed, let me first consider the concept of "royalty" in the facts and circumstances of the case in hand.

CONCEPTS OF ROYALTY:

18. In the case of AIR 1943 153 (Privy Council) , the Privy Council observed that the royalty is "in substance a rent; it is the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows." Thus, royalty in substance is rent. It appears that the concept of royalty is to compensate a right owner of the property who permits or allows others to use his rights from his property. This concept is also understood as "Mesne profit" in legal parlance. Strictly speaking during the tenure of contractual tenancy what is paid by the tenant to his landlord is the contractual rent. After quit notice from the date of termination of tenancy, the characteristics of the subject matter is changed to damages for use and occupation of the premises and after filing of the suit for eviction till the possession is handed over, if the decree of possession is passed in favour of the landlord, the characteristic is changed to mesne profits. To what extent the quantum changes with the change of such characteristics is for the Courts to decide which the Courts do mould according to the facts and circumstances of the case to do justice between the parties.

19. One may use different words like compensation, licence, royalty and mesne profits, all in one form or another are diverse forms of rents in generic sense and what is the true colour of the payments made by one party to another for use and occupation of the property is to be decided by the Court looking to the circumstances of the case and evidence on record. Rent in English Law is said to be a profit from the property demised. It may assume the form of rent service or rent charge.

20. It is described in generic sense as compensation for use and occupation and in legal sense, it is recompense paid by the tenant to his landlord for exclusive possession of the premises enjoyed by him. However, rent flows by virtue of the contract express or implied and after the contract of tenancy is terminated it will be damages or compensation. After the suit for possession is filed, monetary payments for use and occupation against the wish of the landlord assume the format of "mesne profits".

CONCEPTS OF MESNE PROFITS:

21. The term "mesne profit is used for damages for trespass, a wrongful act relating to immovable property and the said wrongful act forms one of the torts affecting realty i.e. immovable property. The enlarged scope of this term is meant to claim profit from one whose possession did not originate in trespass but is nevertheless wrong, as for example when the tenant or occupier of a

property is dispossessed legally and decree of possession has been passed in favour of the landlord, still the tenant/occupier holds over the property for a specified period before handing over the possession to the rightful owner. Though the tenant had a rightful possession when he entered the immovable property but it is the decree of possession which makes his possession wrongful.

22. The concept of "Mesne Profits" has been codified in Section 2(12) of Code of Civil Procedure, 1908 in the following words:

Mesne Profits" of a property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.

The purpose of using adjective "Mesne", which means middle or intermediate, is to indicate the pecuniary benefits translated in terms of money payable by a person in wrongful possession to his landlord in place of rent.

23. The dissection of the aforesaid definition reveals that wrongful possession of the person is the very essence for the claim for mesne profits.

THE MEASURE OF MESNE PROFIT:

The measure of "Mesne profits" is not what the landlord had lost by not being able to get possession, but what the user of the property meant to the defendant who was in wrongful possession. In other words, the basis for determining the quantum of mesne profit is: what the defendant might with ordinary diligence have received from the property. The person in wrongful possession cannot be heard to say that he has not utilized the property, made no profits, no rent is being derived from the property in dispute as such not liable to pay mesne profit. At the same time person in wrongful possession is not liable to realize highest possible rates of rent or profit. A plain reading of the definition of mesne profit would leave no manner of doubt that the real test to be applied is, not what the plaintiff decree holder had lost or would have earned by letting out or using the property himself, but what the person in wrongful possession, namely, with ordinary diligence would have received from it. The wrongful possession of defendant is the very essence of a claim for mesne profits. The very foundation of the defendant's liability to pay the mesne profit goes with actual possession of the land. That is to say, generally the person in wrongful possession and enjoyment of the immovable property is liable to pay mesne profits. Thus the claim for mesne profits is virtually the claim for damages and has to be assessed by proper exercise of judicial discretion.

24. The base for measure of mesne profits has come up before the Courts from time to time whether in Rent Control period or pre-rent control period. Number of decisions of the Courts have gone on legal record with respect to the subject of mesne profits, a few are quoted hereafter to sieve the indicators or measure of mesne profits.

25. The Privy Council in the case of (Gurudas Choudhury v. Kumar Hemandra Kumar Roy) 1929(56) I.A. 290 and AIR 1930 82 (Privy Council) observed as under:

The test set by the statutory definition of "mesne profits" was clearly not what the plaintiff has lost by his exclusion but what the trespasser has or might or would have made can only be relevant as evidence of what the trespasser might, with reasonable diligence have received. The possession of the judgment debtor and his wrongful possession are thus the prime matter of consideration and not the possession of the landlord the decree holder.

26. In the case of Poluru Ranga Rao and Others Vs. Koppolu Ramadoss and Others, , the Court has laid down principle of "Mesne profits" as not what the person out of possession could have got (i.e. land owner) but as the person in wrongful possession actually received or might with ordinary diligence have received and further observed that principle was unquestionable.

27. In the case of Fateh Chand Vs. Balkishan Das, , the question was whether or not "mesne profits" should be based on the estimated value of the property? The Supreme Court while dealing with the question in para 17 page 1413 observed as under:

The normal measure of mesne profits is the value of the user of land to the person in wrongful possession. The assessment made by the High Court in respect of compensation at the rate of five per cent of what they regarded as the fair value of the property based not on the value of the user, but on an estimated return on the value of the property cannot be sustained.

(Emphasis supplied)

It is thus clear that the mesne profits are to be calculated on the basis of advantage derived by the person in wrongful possession by the user of the property and not the fair value of the property.

28. The Supreme Court in the case of Atma Ram Properties (P) Ltd. Vs. Federal Motors Pvt. Ltd., , with approval referred to the judgment of the Nagpur High Court in the case of (Bhagwandas Lakhamsi v. Kakabai) AIR 1953 Nag. 186, wherein the learned Chief Justice of the Nagpur High Court held that the Rent Control Order governing the relationship of landlord and tenant, has no relevance for determining the question of what should be the measure of damages which a successful landlord should get from the tenant for being kept out of the possession and enjoyment of the property. The learned Chief Justice observed that after determination of the tenancy, the position of the tenant is akin to that of a trespasser and he cannot say that the measure of damages awardable to the landlord should be kept tagged to the rate of rent payable under the provisions of the Rent Control Order.

29. If the real value of the property is higher than the rent earned then the amount of compensation for continued use and occupation of the property by the

tenant can be assessed at a higher value. The Supreme Court convinced with this view of the Nagpur High Court in the case of Atmaram Properties Pvt. Ltd. (supra).

30. The Supreme Court in the case of Dalhousie Properties Ltd. Vs. Surajmull Nagarmull, , laid down yet another principle of determination of the concept of "present rental value" in the field of law of Mesne Profits.

The above referred decisions have recognized some of the principles to be followed while determining mesne profits/royalty/ compensation. The method of valuation may well depend upon the nature of property and the purpose for which the valuation is required. The prospective profit from the property is also one of the methods adopted generally, only if comparative data is not available.

31. Having taken survey of the various cases and methods of valuation, it can be broadly summarised as under:

- i) The claim for "Mesne Profit" remains floating till the decree of possession is passed in favour of the plaintiff, which can also be termed as royalty;
- ii) The measure of Mesne Profits is the value for the use of the premises and not necessarily the value of the property;
- iii) Value for use will be determined by:
 - a. What that value will be in the hands of the person in wrongful possession;
 - b. comparables, if available and applicable in real sense;
 - c. finding out the prevailing rate of rental at which the wrongful person ought to have found equivalent accommodation.

APPLICATION OF ABOVE PRINCIPLES

32. No, if one turns to the facts of the present case in general and the order dated 29.11.2006 passed by the Court Receiver in particular, the foundation thereof is the valuation report of M/s. S.S. Joshi Associates dated 28.11.2006, in which the test applied for determination of the amount of royalty is the estimated returns from the suit property. What is taken into account is the estimated value of the property and estimated loss of profit or income suffered by the owner. The proper measure of Mesne Profits ought to be value of the user of the land or the premises to a person in wrongful possession as ruled by the Apex Court in the case of Fateh Chand {supra}. The Apex Court has clearly ruled that an estimated value of the property and estimated returns thereof cannot be the basis for computing the mesne profits. The valuer in addition to the method adopted ought to have ascertained the value of the user of the suit premises in the hands of the defendant. In addition, the valuer ought to have found out the comparables coupled with the prevailing rate of rentals or the prevailing rate of rent at which the wrongful person could have found equivalent accommodation on the date of the suit. In addition to this annual letting value of the suit

premises determined by the Municipal Corporation ought to have been taken into account for determining the quantum of monthly royalty floating mesne profit till the decree for possession is passed in favour of the plaintiffs.

33. The Supreme Court in *Smt. Tribeni Devi and Others Vs. Collector of Ranchi*, , recognized the necessity to consider even two or all those methods for the reason that an exact valuation is not always possible as no two properties can be same in respect of situation or extent of potentiality nor is it possible in all cases to have reliable material from which the valuation can be accurately determined. In *Controller of Estate Duty, Madras Vs. R.K. Chettiar (Decd.) by Lrs.*, , it was held that where there was a wide disparity in the value obtained by two methods, an averaging could be taken. Same is also the view taken in *V.N.V. Pratap Vs. Commissioner of Wealth-tax*, . Thus, majority of the High Courts are of the view that where there are more than one resultant valuations, that which is the nearest to the market value, taking into account all circumstances should be taken as the applicable value.

34. The same principle can very well be followed in determining the amount of royalty with possibility of minimum error since mathematical certainty is not demanded nor is it possible.

The Court Receiver while determining the amount of royalty is also expected to bear in mind the observations made by the learned Single Judge in the case of (*Pradeep C. Modi v. Shashank*) AIR 1998 Bom 352, wherein it was observed that the Court appoints the Receiver for the preservation of the property pending determination of the rights of the rival parties. The royalty is always charged by the undisputed owner of property. Where the ownership rights are not determined it is the duty of the Court to preserve the property.

35. The Court appoints its own agent i.e. the Court Receiver. The Court Receiver is entrusted with the property and the Court Receiver has to take every such action which would protect the property and further the Court Receiver has to discharge his duties as an agent of the Court though he has to take all necessary steps to preserve and protect the property till rights are finally determined after adjudication. But while doing so he cannot profiteer in the name of fixing royalty to be paid by his agent who is also party to the litigation.

36. In the case of (*Housing Development Finance Corporation v. Infra Industrial Services Pvt. Ltd.*) the learned Single Judge of this Court while deciding the Chamber Summons No. 949/2003 in Suit No. 2470/2002 (unreported) vide his order dated 26.7.2004 observed that the Court Receiver should not determine exorbitant amount of royalty so as to make it impossible for occupant to pay. The exercise ought not to deprive somebody in the premise by an interim measure. The Court Receiver should not make it impossible for the party to continue in occupation and thereby force him to surrender the possession. It is also observed that the Court Receiver is expected to strike balance which would enable the plaintiffs to realise the amount while protecting the security and at the same

time to see to it that occupant is not deprived of use, occupation and possession of the premises pending litigation, while striking the balance between two competing claims. At the same time the amount of royalty fixed should not be prohibitory and exorbitant.

37. In the case on hand, the valuer has only adopted one method of valuation ignoring all other methods as indicated. In the case like one in hand, the valuer in addition to the mode of valuation adopted by it, was also expected to find but the annual letting value of the property determined by the Municipal Corporation, which is readily available with the Corporation and should have also made an attempt to find out the prevailing rentals at which the wrongful person could find equivalent accommodation and after collecting all the necessary data, the amount of royalty ought to have been determined taking a balanced view of the matter. Having not done so, the matter requires a fresh look by the valuer as well as the Court Receiver.

38. In the aforesaid view, the impugned order passed by the Court Receiver is unsustainable. The same is set aside and the proceeding stand remitted back to the Court Receiver with directions to decide the question of royalty afresh as indicated herein following principles of natural justice. The Court Receiver is expected to complete the process of determination of royalty afresh within three months from the date of this order.

39. Having said so, now the question is what should be the amount of interim royalty to be paid by the defendant pending determination of the amount of royalty afresh by the Court Receiver. The best guide for determination of the amount of interim royalty would be the basis of the Chamber Summons taken out by the defendant with slight variation. If one turns to the chamber summons and affidavit in support thereof, the defendant himself has admitted that the suit premises admeasures as 2477 sq.ft. and the total consideration agreed was Rs. 2,35,31,500/- and claimed deduction of Rs. 1,00,00,000/- deposited by him under the orders of the Appeal Court on 9.10.2007, leaving balance of Rs. 1,35,31,500/- for calculating the return of property @ 10%.

40. Now the question as to whether the defendant is right in claiming deduction for the entire amount of Rs. 1,00,00,000/- deposited by him. Answer has to be in negative. Firstly, because this amount did not come to the pocket of the plaintiffs. Out of Rs. 1,00,00,000/-, Rs. 50.00 Lac stood exhausted in payment of licence fees and/or arrears thereof, which the defendant was liable to pay the plaintiffs. The balance Rs. 50.00 Lac are deposited with the Court Receiver. At the most, for the purposes of fixing and/or calculating interim royalty the defendant may be entitled to claim benefit of it, since he is also out of pocket to that extent. Thus for the present calculation taking a return @ 10% per annum on the amount of Rs. 1,85,31,500/- and considering rise in rental over and above the return @ 10% per annum, the defendant can be directed to pay Rs. 1,75,000/- with effect from 1st December, 2006 till determination of the amount of royalty by the Court Receiver.

41. The amount of royalty as may be fixed and received by the Court Receiver shall be retained in deposit until suit is decided so that the amount of deposit could be disbursed by this Court consistently with the opinion formed at the end of the trial. If the suit is dismissed, option exercised by the defendant is held to be legal and proper, then right of the plaintiffs to receive the amount of royalty/ mesne profits will have a different colour. If the suit is decreed, use and occupation including possession of the defendant pending trial of the suit would, obviously, be without authority of law making him liable to pay mesne profits for the period for which plaintiffs were kept out of possession of the suit property.

Both the chamber summons stand disposed of in terms of this order. Order accordingly.

42. At this stage, Mr. Chhagla, learned Senior Counsel appearing for the plaintiffs prayed for stay of the operation of the order pronounced. The said prayer is opposed by the learned Counsel for the defendant. During the course of hearing Mr. Chhagla for the first time brought to my notice that the order passed by the Court Receiver is actually acted upon by the defendant and that the defendant has been paying the amount of royalty fixed by the Court Receiver. If this be so, the effect and operation of para-36 of this order is liable to be stayed for eight week. Order accordingly.