

(2024) 09 BOM CK 0005

In the Bombay High Court

Case No : Civil Revision Application No.424, 1604 Of 2024

M/s Forbes Gokak Ltd

APPELLANT

Vs

Bharat Petroleum Corporation Limited

RESPONDENT

Date of Decision : 10-09-2024

Acts Referred:

Code of Civil Procedure, 1908 — Section 34, 34(1), Order 20 Rule 12(1)(c)

Citation : (2024) 09 BOM CK 0005

Hon'ble Judges : Sandeep V. Marne, J

Bench : Single Bench

Advocate : G.S. Godbole, Pooja Thakkar, Pankaj Sawant, Roop Basu, Ahmed Padela

Final Decision : Partly Allowed/Dismissed

Judgement

Sandeep V. Marne, J

1 These are cross Civil Revision Applications filed by the tenant and landlord aggrieved by the decisions of Small Causes Court and its Appellate Bench with regard to fixation of mesne profits and rate of interest payable thereon. The Tenant-Bharat Petroleum Corporation Limited (BPCL) has filed Civil Revision Application (Stamp) No.1604 of 2024 challenging the judgment and order dated 15 July 2023 passed by the Appellate Bench of Small Causes Court rejecting its Miscellaneous Appeal No.130 of 2022 and confirming the order dated 21 January 2022 passed by the learned Single Judge of Small Causes Court in Mesne Profits Application No.747 of 2013. The landlord had filed Cross-Objections in BPCL's Miscellaneous Appeal No.130 of 2022 aggrieved by the quantum of mesne profits fixed by the learned Single Judge of Small Causes Court as well as the rate of interest payable thereon. The Cross-Objection is also rejected by the Appellate Bench by impugned judgment and order dated 15 July 2023, which is subject matter of challenge in Civil Revision Application No.424 of 2024 filed by the landlord. In short, while the Tenant-BPCL expects reduction of quantum of mesne profits as well as the rate of interest, the landlord expects enhancement of both

quantum of mesne profits as well as the rate of interest.

2 Since the scope of enquiry involved in the present Revision Applications is limited, it is not necessary to make detailed reference to the facts involved in the Revision Applications. Suffice it to record that the landlord-M/s. Forbes Gokak Limited had initiated TE & R Suit No.24/24 of 2003 against Defendant-BPCL seeking recovery of possession of the suit premises being Flat on the Ground Floor, Left Wing, Lyndewode House, 9, Bomanji Petit Road, Cumballa Hill, Mumbai – 400 026 (suit premises). The suit came to be decreed on 15 October 2010 directing Defendant-BPCL to handover possession of the suit premises to Plaintiffs-landlords. The Trial Court ordered separate enquiry as to mesne profits under Order 20, Rule 12(1)(c) of the Code of Civil Procedure, 1908 (Code). The decree was appealed by Defendant-BPCL before Appellate Bench of Small Causes Court in Appeal No.476 of 2010. The Appellate Court granted stay to the decree subject to payment of interim compensation of Rs.4,70,496/- per month by order dated 13 July 2011. It appears that Defendant-BPCL started depositing the interim compensation in the Small Causes Court since October 2010. The Appeal No.476 of 2010 came to be dismissed by the Appellate Bench vide judgment and order dated 21 January 2013.

3 Defendant-BPCL filed Civil Revision Application No.313 of 2013 in this Court. However, during pendency of the said Revision Application, Defendant-BPCL expressed willingness to handover possession of the suit premises. Accordingly, this Court disposed of the Civil Revision Application by order dated 25 March 2013. By further order dated 9 May 2013, this Court gave time upto 31 December 2013 to the Defendant-BPCL to vacate the suit premises. This Court also granted liberty to Plaintiff-landlord to withdraw the amounts deposited by Defendant-BPCL subject to the outcome mesne profit enquiry.

4 Plaintiffs-Decree Holder filed Mesne Profit Application No.747 of 2013 before Small Causes Court, Mumbai. It relied upon Valuation Report dated 25 June 2013 of M/s. Poonager Bilimoria & Company, Architects and Surveyors and claimed mesne profits at following rates:

Period

Amounts of mesne profit claimed per

month by the Plaintiff/Applicant

01.08.2001 to 31.12.2002

Rs.3,95,000/- plus interest

01.01.2003 to 31.12.2005

Rs.4,00,000/- plus interest

01.01.2006 to 31.12.2008

Rs.5,10,000/- plus interest

01.01.2009 to 31.12.2011

Rs.6,60,000/- plus interest

01.01.2012 to 31.12.2013

Rs.9,05,000/- plus interest

5 Plaintiff also sought interest at the rate of 18% per annum compounded quarterly from 1 August 2001 till realization of the entire amount. The Application was resisted by Defendant-BPCL by filing Reply. Plaintiffs-landlords examined Mr. Cyrus S. Patel as PW1, the Mr. S. P. Rao, Valuer working with M/s. Poonager Bilimoria & Company-as PW2. Plaintiffs-landlords also relied upon several documents including copies of Leave and License Agreements in respect of flats in the building. Defendant-BPCL examined its Senior Manager Shri Puneet Gupta as DW1, another Senior Manager Mr. Rajesh K. Sippy as DW 2 and Valuer Mr. Vijay Lad as DW3. Defendant – BPCL also relied upon several documents including the Valuation Report.

6 After considering the pleadings filed in Mesne Profits Application No.747 of 2013, oral and documentary evidence, the learned Judge of the Small Causes Court partly allowed the Application directing payment of mesne profits for the period from 1 August 2001 to 31 December 2013 amounting to Rs.4,90,50,000/- alongwith simple interest at the rate of 9% per annum from 1 August 2001 to 20 January 2022 of Rs.5,99,60,640/-. The amount already paid by Defendant-BPCL towards occupation charges as per the orders passed by this Court and by the Appellate Bench was directed to be adjusted from the total claim of Rs.10,90,10,640/-. On failure on the part of Defendant-BPCL to pay the amount within one month, it is directed to pay simple interest at the rate of 9% per annum on the principal amount of Rs.4,90,50,000/- till realization of the entire amount.

7 Both Plaintiffs-landlords as well as Defendant-BPCL got aggrieved by the judgment and order dated 21 January 2022 passed by the learned Judge of the Small Causes Court. Defendant-BPCL filed Miscellaneous Appeal No.130 of 2022 before the Appellate Bench challenging the judgment and order dated 21 January 2022. Plaintiffs-landlords filed cross Appeal/cross Objection in the said Miscellaneous Appeal No.130 of 2022. The Appeal and the Cross Objection have been decided by the Appellate Bench of Small Causes Court by common judgment and order dated 15 July 2023 and the Appeal of Defendant-BPCL as well as Cross Objection of Plaintiffs-landlords have been dismissed by confirming the judgment and order dated 21 January 2022 passed by the Trial Court. Aggrieved by the judgment and order dated 15 July 2023 passed by the Appellate Bench of Small Causes Court, the present cross Revision Applications are filed by Defendant-BPCL and Plaintiffs-landlords.

8 Mr. Sawant, the learned Senior Advocate appearing for the Defendant-BPCL would submit that the quantum of mesne profits fixed by the learned Judge of

Small Causes Court is excessive and warrants substantial deduction. He would submit that the learned Judge has fixed mesne profits ranging from Rs.2,50,000/- per month during 2001-2004 and going upto Rs.4,50,000/- during the year 2013 where in fact the rental returns receivable in respect of the suit premises during the relevant time was substantially less. Taking me through the findings recorded by the learned Judge with regard to the report of Plaintiff's valuer, Mr. Sawant would submit that the learned Judge himself has found several infirmities in the said report and in fact has recorded a specific finding that the said report is not helpful for the purpose of determination of mesne profits. Taking me through the Valuation Report of Mr. Rao (M/s. Poonager Bilimoria & Company) he would submit that the rent in respect of much larger flat admeasuring 2865 sq. ft. was fixed with the Plaintiff-landlord at Rs.70.75 per sq. ft. working out to Rs.2,02,698/- per month. That similarly another instance was quoted by Plaintiff's valuer where the rent was fixed at Rs.1,46,172/- in respect of Standard Chartered Grindlays Bank Limited. That therefore the learned Judge grossly erred in fixing Rs.2,50,000/- to Rs.4,50,000/- towards monthly mesne profits in respect of suit flat having much less area of 2497.74 sq.ft.

9 Mr. Sawant would further submit that learned Judge has erred in awarding interest at the rate of 9% per annum on the amount of mesne profits by assuming the transaction between the parties of commercial nature. That the learned Judge erred in ignoring the provisions of Section 34 of the Code and that the transaction between the parties, being not connected with industry, trade or business of the party incurring the liability (Defendant-BPCL), the transaction could not be treated as commercial one. That Defendant-BPCL is not in the business of owning or renting properties and the transaction does not arise of core business of Defendant-BPCL relating to petroleum products. That therefore 6% interest ought to have been awarded on the amount of mesne profits under Section 34 of the Code.

10 Lastly, Mr. Sawant would submit that the methodology adopted by the learned Judge in computing interest on the total amount of mesne profits is entirely wrong. That though the amount of Rs.4,70,496/- paid every month from October 2010 till December 2013 is directed to be adjusted by the learned Judge, he has failed to provide solace to Defendant-BPCL towards interest payable in respect of the said deposits. He would invite my attention to the chart prepared by Defendant-BPCL and produced it in Civil Revision Application (Stamp) No.1604 of 2024 to demonstrate the correct manner in which the interest on monthly deposit of Rs.4,70,496/- ought to have been deducted.

11 So far as Civil Revision Application No.424 of 2024 filed by Plaintiffs-landlords is concerned, Mr. Sawant would submit that since the quantum of mesne profit as well as rate of interest fixed by the learned Judge is excessive, there is no question of entertaining Civil Revision Application No.424 of 2024 filed by the Plaintiffs-landlords. He would pray for dismissal of the said Civil Revision

Application.

12 Mr. Godbole, the learned Senior Advocate appearing for Plaintiffs-landlords would submit that the learned Judge has fixed the quantum of mesne profits on extremely conservative basis by ignoring the rental instances provided by the Plaintiffs-landlords in respect of similar premises located in the same building. He would submit that the suit premises are located in one of the elite and up-market areas of Mumbai City having access from Warden Road (Bhulabhai Desai Road) and Peddar Road. That the suit building is maintained in extremely good condition and has vast surrounding open space. That it has come in evidence that the flats situated in the suit building are occupied and used by either persons with high positions in Society or high networth individuals (HNIs). That this was the reason why Defendant-BPCL thought of setting up its own guest house in such elite building so as to entertain its guests including bureaucrats and top-level officers of Defendant-BPCL. He would submit that considering the above factors, the learned Judge ought to have accepted the valuation suggested by the Plaintiffs-landlords' valuer. That the learned Judge has unnecessarily and erroneously sliced the rental returns payable in respect of suit premises ignoring the fact that in respect of similarly sized flats Plaintiffs-landlords were earning much higher rental returns. That the learned Judge erred in taking into consideration negotiated rent of Rs.2,02,778/- with City Bank for the period from 1 August 2001 to 31 July 2004. Ignoring the fact that the lower rate was accepted for the purpose of securing possession from the Bank and that immediately thereafter from 1 August 2004 rent at the rate of Rs.3,00,000/- was received in respect of the very same flat. He would submit that Plaintiffs-landlords' valuer gave other instances of payment of license fees of Rs.7,20,000/- in respect of another flat in the same building. That though Plaintiff-landlord's valuer suggested rental returns ranging from Rs. 3,95,000/- per month during 2001-2002 and going upto Rs.9,05,000/- per month during 2012-2013, the learned Judge ought to have fixed the base rent of atleast Rs. 3,00,000/- as on 1 August 2001. That therefore reasonable increase in heavily slashed rates applied by the learned Judge is warranted in the facts and circumstances of the present case. That Plaintiff-landlord's Valuer's Report made in a systematic manner based on rental instances of premises located in the same building, could not have been ignored by the learned Judge.

13 So far as the rate of interest is concerned, Mr. Godbole would submit that the transaction in question is undoubtedly of commercial nature. That the Defendant-BPCL was using the suit premises for operating its guest house and not as staff quarters. That Defendant-BPCL is one of the Navaratna Companies of Government of India with extremely profitable operations and that therefore the learned Judge ought to have awarded 18% commercial interest. That the learned Judge ought to have taken into consideration the rate of interest on commercial lending applicable at relevant time. So far as the ground of erroneous computation of interest raised by Defendant-BPCL, Mr. Godbole would contend that computation of interest is purely in the realm of Executing Court not

warranting any interference by this Court. He would therefore pray for allowing Civil Revision Application No.424 of 2024 and dismissing Defendant-BPCL's Civil Revision Application (Stamp) No.1604 of 2024.

14 Rival contentions of the parties now fall for my consideration.

15 Defendant-BPCL is made liable to pay mesne profits with effect from 1 August 2001 till 31 December 2013, when possession of the suit premises was handed over to Plaintiffs-landlords. There is no dispute between the parties about the period during which mesne profits are payable. The dispute is essentially two-fold viz. (i) quantum of mesne profits, and (ii) rate of interest. The third point sought to be agitated by Defendant-BPCL is about methodology for computation of interest adopted by the learned Judge of the Small Causes Court. I proceed to consider each of the three aspects.

16 So far as quantum of the mesne profits are concerned, the learned Judge has determined the total amount of mesne profits payable for the period from 1 August 2001 to 31 December 2013 at Rs. 4,90,50,000/- by fixing monthly amount of mesne profits as under:

Period

Mesne profits in Rs. (per month)

Amount of Mesne Profits

01.08.2001 to 31.07.2004

2,50,000

$2,50,000 \times 36 = 90,00,000/-$

01.08.2004 to 31.07.2007

3,00,000

$3,00,000 \times 36 = 1,08,00,000/-$

01.08.2007 to 31.07.2010

3,50,000

$3,50,000 \times 36 = 1,26,00,000/-$

01.08.2010 to 31.07.2013

4,00,000

$4,00,000 \times 36 = 1,44,00,000/-$

01.08.2013 to 31.12.2013

4,50,000

$4,50,000 \times 5 = 22,50,000/-$

17 Thus the monthly mesne profits are fixed at Rs. 2,50,000/- during the first three year period from 1 August 2001 to 31 July 2004 thereafter the same is increased by Rs. 50,000/- at interval of every three years and this is how the amount payable on the date of vacation of the suit flat is Rs.4,50,000/- per month.

18 Both the sides relied upon their respective valuation reports. Defendant-BPCL relied upon valuation report of Mr. Lad. However, in his usual fairness, Mr. Sawant is candid enough in admitting Mr. Lad did not take into consideration even a single comparable instance from the same building though several flats appear to have been let out on leave and license basis in the same building during the relevant period. In my view, the learned Judge has rightly rejected the valuation report of Mr. Lad relied upon by Defendant-BPCL.

19 Plaintiff relied upon valuation report of Mr. S.P. Rao of M/s. Poonager Bilimoria & Company, who indicated the mesne profits payable at Rs. 3,95,000/- in August 2008 and going up to Rs.9,05,000/- in December 2013. Mr. Rao has undoubtedly relied upon several comparable instances in the same building. The Plaintiffs-landlords' valuer considered flat let out to City Bank in which Consent Terms were entered on 23 August 2004 in respect of flat with carpet area of 2865 sq.ft and negotiated and concessional rent was agreed at Rs.70.75 sq.ft. (which works out to be Rs.2,02,698/- per month). The valuer however thereafter referred to City Bank paying higher compensation of Rs.3,00,000/- per month from 1 August 2004 to 31 March 2007 in addition to interest on security deposit of Rs. 5,00,000/-. He further took into consideration comparable instance of Standard Chartered Grindlays Bank Limited, who was also protected tenant prior to enactment of Maharashtra Rent Control Act, 1999 and against whom recovery suit was pending in which Consent Terms were filed on 7 May 2004. Under the Consent Terms monthly compensation of Rs.1,46,172/- was agreed to be paid by Standard Chartered Grindlays Bank. The valuer thereafter took into consideration further Leave and License Agreement executed by Standard Chartered Grindlays Bank in respect of Flat No. 5 on first floor and by agreement dated 26 April 2013 the premises are let out at license fees of Rs. 7,20,000/- per month payable six months in advance. Considering the interest receivable on deposit of advance license fees etc. the valuer assessed the license fees in respect of said flat admeasuring 2680 square feet at Rs. 7,74,000/- per month. The Valuer also took into consideration comparable instance of Flat No.8 on third floor of the building in respect of which license is granted to Steneor UK Ltd. on 10 January 2006 at Rs. 2,21,250/- per month, in addition to compensation for amenities of Rs. 1,53,750/- totaling Rs. 3,75,000/- for flat admeasuring 2164 sq.ft. Thus the rentals in respect of various flats in the building have varied on case to case basis as under:

City Bank

2,02,698

01-08-2001 to 31-08-2004

City Bank

3,00,000

01-08-2004 onwards

Standard Chartered Bank

1,46,172

07-05-2004 (Consent Terms)

Steneor UK Ltd.

2,21,250

Amenity Agreement of 1,53,750

10-01-2006

Standard Chartered

Grindlays Bank

7,20,000

26-04-2013

20 Thus, except the stray case of Standard Chartered Grindlays Bank (relating to period after handing over the possession by BPCL), it appears that the gap between the rent received by Plaintiffs in respect of other flats in the same building and the quantum of mesne profits fixed by the Trial Court does not appear to be too wide. In fact, Plaintiff had agreed to receive lesser amounts from City Bank (Rs. 2,02,698) and Standard Chartered Bank (Rs. 1,46,172) during the relevant period. Even in respect of the license agreement executed in favour of Flat No. 8 admeasuring 2164 sq.ft on third floor let out to Steneor UK Ltd., license fees of Rs. 2,21,250/- was agreed in the year 2006. Though separate Amenities Agreement is executed, it is not known as to what were the exact amenities provided, for which additional sum of Rs. 1,53,750/- was agreed to be paid by the licensee.

21 Considering the overall conspectus of the case, I am of the view that the learned Judge has rightly assessed the mense profits in the facts and circumstances of the present case and therefore the quantum of mesne profits fixed by the learned Judge do not warrant any interference in exercise of revisional jurisdiction by this Court in absence of any palpable error in exercise undertaken by the learned Judge. The quantum has been reasonably and correctly fixed at Rs. 2,50,000/- per annum for first three year period with increase by Rs. 50,000/- at interval of every three year. The quantum of mesne profits determined by the learned Judge is neither grossly excessive nor

substantially low to warrant interference by this Court. In fact, if the figure of mesne profits of Rs. 4,50,000/- payable during the year 2013 is taken into consideration and yearly compounded increment of 5% is added, the rental return in the year 2024 would be to the tune of Rs.7,70,000/-. It is a matter of common knowledge that in the city of Mumbai, the usual yearly increment for residential premises is in the range of 5%. Considering this position, I am of the view that the learned Judge has rightly fixed the quantum of mesne profits which neither appears to be excessive nor on lower side.

22 Coming to the issue of rate of interest, it is the complaint of Defendant-BPCL that 6% interest ought to have been awarded by applying provisions of section 34 of the Code, which provides thus:

"34. Interest.- (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six per cent. per annum, as the Court deems reasonable on such principal sum, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit:

Provided that where the liability in relation to the sum so adjudged that arisen out of a commercial transaction, the rate of such further interest may exceed six per cent. per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalized banks in relation to commercial transactions.

Explanation I. - In this sub-section, "nationalized bank" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970).

Explanation II.- For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.

(2) Where such a decree is silent with respect to the payment of further interest on such principal sum from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie."

23 Thus under section 34 of the Code, the Court can award interest not exceeding 6% per annum when there is a decree for payment of money. Under Proviso to sub-section (1) of section 34, the Court can award interest in excess of 6% when the liability in relation to the sum adjudged arises out of a commercial transaction. However, under Explanation II of sub-section 1 of section 34 of the Code, the transaction is required to be treated as commercial transaction only if it is connected with the industry, trade or business of the party

incurring the liability. In the present case, the party incurring the liability is Defendant-BPCL. Therefore, to claim interest in excess of 6%, it was necessary for Plaintiff-decree holder to establish that its transaction with Defendant-BPCL arose out of the industry, trade or business of Defendant-BPCL.

24 The transaction, out of which the liability is fastened on Defendant-BPCL arises out of occupation of the suit premises by it which were initially taken by it on rent. This is not a case where the liability for payment of money for Defendant-BPCL has arisen on account of any transaction relating to business in petroleum products. Defendant-BPCL is not in the business of owning or renting properties. Taking premises on rent is not the business activity of Defendant-BPCL. If Plaintiffs were to supply petroleum products to Defendant-BPCL and if Defendant-BPCL was to incur any liability to pay any amount to Plaintiffs out of such supply, the concerned transaction would have assumed the character of commercial transaction. Also, if the suit premises were to be used by Defendant-BPCL for sale of any of its products, the transaction of renting of such premises may have attracted the color of commercial transaction. For Plaintiff it may be a commercial transaction. However, the business or trade of Plaintiff is irrelevant and for claiming interest in excess of 6%, it is necessary to prove that the transaction arose out of industry, trade or business of the party incurring the liability, which in the present case is Defendant-BPCL. Since Defendant is not engaged in industry, trade or business of renting of residential properties, the transaction of payment of rent in respect of suit premises cannot be treated as commercial transaction. In my view therefore, the learned Judge has erred in assuming the transaction in question to be commercial transaction. Therefore, the learned Judge ought to have awarded only 6% interest on the amount of mesne profits payable by the Defendant-BPCL to Plaintiffs. To this limited extent, the orders passed by the learned Judge of the Small Causes Court and its Appellate Bench deserve modification.

25 So far as last aspect of methodology adopted by the learned Judge of the Small Causes Court in computing the amount of interest of Rs.5,99,60,640/- is concerned, the same appears to be completely erroneous. Firstly, the amount of interest would come down on account of reduction of rate of interest from 9% to 6%. Secondly, the Small Causes Court cannot award interest to Plaintiffs on monthly amount of Rs.4,70,496/- paid from October 2010 (Rs.2,58,014/- paid in October 2010 and Rs.4,70,496/- paid from November 2010) to December 2013. Since the said amounts are already paid by Defendant-BPCL and withdrawn Plaintiffs-landlords, there is no question of Defendant-BPCL being made liable to pay interest on those amounts. It is therefore required to be clarified that while computing the interest payable by Defendant-BPCL, the reduced liability on account of deposit of monthly amount of Rs.4,70,496/- from October 2010 is required to be taken into consideration. To this extent also, the order passed by the learned Judge of the Small Causes Court deserves modification.

26 I accordingly proceed to pass the following order:

ORDER

i) The quantum of mesne profits fixed by the learned Judge of the Small Causes Court and upheld by the Appellate Bench is not disturbed.

ii) The rate of interest payable on the amount of mesne profits shall stand reduced to 6%.

iii) While computing the interest payable on the amount of mesne profits, the monthly compensation paid/deposited by Defendant-BPCL of Rs. 2,58,014/- in October 2010 and Rs. 4,70,496/- during November 2010 to December 2013 shall be excluded.

iv) To the above extent, the judgment and order dated 21 January 2022 passed by the learned Judge of the Small Causes Court in Mesne Profit Application No.747 of 2013 and by its Appellate Bench on 15 July 2023 in Miscellaneous Appeal No.130 of 2022 shall stand modified.

27 Civil Revision Application (Stamp) No. 1604 of 2024 is accordingly partly allowed and Civil Revision Application No.424 of 2024 is dismissed. There shall be no order as to costs.