(1998) 05 BOM CK 0008

In the Bombay High Court

Case No : Chamber Summons No. 52 of 1998 in Suit No. 2683 of 1991

Pradeep C. Mody APPELLANT

Vs

Sashikant C. Mody and others RESPONDENT

Date of Decision : 04-05-1998

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1, Order 40 Rule 3
Succession Act, 1925 — Section 218

Citation : AIR 1998 Bom 351 : (1998) 4 ALLMR 306 : (1998) 3 BomCR 823

Hon'ble Judges : R.J. Kochar, J

Bench : Single Bench

Advocate : M.P.S. Rao, for the Appellant; R.A.K. Nijam-es-Sani, for the Respondent

Judgement

R.J. Kochar, J.—Defendant No. 1 has called upon me to decide whether the amount of royalty/compensation should exceed the amount of rent payable by the tenant to the landlord.

2. The facts which have been briefly stated by A.P. Shah, J., in his order dated 2nd August, 1995 in Notice of Motion No. 1877 of 1991 in Suit No. 2683 of 1991 are that the plaintiff and the defendants are the children of late Chimanlal and Shantaben, who died in 1951 and 1975 respectively. Since the deceased had left property, the present suit came to be filed for administration of the estate of the deceased and for partition of joint family property. The plaintiff had taken out a Notice of Motion for appointment of Court Receiver and injunction. The learned Judge has enumerated the different properties in paragraph 3 of his order. In the present case, we are concerned only with Shop No. 6 in R.K. Building No. 3 Co-operative Housing Society, which is admittedly in occupation of the defendant No. 1 and the tenancy of the said Shop No. 6 stood in the name of the deceased Chimanlal. According to the prima facie observation of the learned Judge, there was some case in favour of the plaintiff in respect of Shop No. 6 and, therefore, he was pleased to appoint Court Receiver for the tenancy rights in respect of the

Shop No. 6 also, while appointing Court Receiver for the other Estate of the deceased. He further directed the Court Receiver to appoint the first defendant as his Agent in respect of Shop No. 6 on such terms and conditions as may be fixed by the Receiver, but without any security. Accordingly, the learned Judge was pleased to dispose of the Notice of Motion. The aforesaid order of the learned Judge was carried in appeal, but the Appeal Court had dismissed the Appeal on 8th April, 1996. It appears that the Court Receiver had fixed an ad-hoc royalty for the Shop No. 6 at the rate of Rs. 5,000/- per month and the Court Receiver called upon the defendant No. 1 to pay the sum of Rs. 55,000/- for the period from August 1995 to June 1996 towards the amount of royalty. This order dated 7th June, 1996 of the Court Receiver was questioned by the first defendant in his letter dated 19th June, 1996, raising a point that the amount of royalty could not exceed the rent payable to the landlord, which was Rs. 169/- per month. He relied on an order of the Division Bench of this Court, presided over by the then Chief Justice, Shri P.D. Desai, sitting with Shri Justice Arvind Savant. The first defendant, therefore, through his Advocate, requested the Court Receiver to reconsider the amount of royalty and fix the same at Rs. 169.00 per month only. After an exchange of letters between the parties and the Court Receiver, it appears that on 10th April, 1997, an order was passed by Smt. K.K. Baam, J., in another Notice of Motion, whereby the Court Receiver was inter alia directed to fix the final royalty within a month from 10th April, 1997. The Court Receiver was also directed to take forcible possession of the premises if the defendant failed to deposit the amount as stated in the order. The parties were further directed to cooperate with the Court Receiver in finalising the amount of royalty. The Court Receiver being in doubt about the final amount of royalty appointed a valuer to submit his Valuation Report to enable the Court Receiver to fix final amount of royalty. Vide the Valuation Report submitted by the Valuer, the amount of royalty should be Rs. 7,000/- per month. The learned Counsel for the plaintiff questioned the property of the valuer''s suggestion of Rs. 7,000/- as royalty and he suggested Rs. 12,000/- to Rs. 14,000/- to be the final royalty of the shop premises which measured about 350 sq.ft. There appears to be some difference between the parties regarding the measurement of the premises, though, however, we are not presently concerned with such a difference. The figure of Rs. 7,000/- suggested by the Valuer was reduced by the Court Receiver to Rs. 5,000/- per month as "fair and reasonable amount of royalty". The Court Receiver had directed the defendant No. 1 to pay as the final royalty Rs. 5,000/ - per month and enter into an Agency Agreement, pursuant to the orders of the Court. This final order of the Court Receiver was not acceptable to the first defendant and, therefore, he had addressed a letter through his Advocate on 29th December, 1997.

3. As stated earlier, the 1st defendant has filed the present Chamber Summons for determining the question whether royalty can be fixed at the rate beyond the actual rent payable by the tenant to the landlord. Both the parties have been vehemently contesting the suit at every stage and for every small point,

obviously so because they belong to one and the same family and are the real brothers and sisters. The learned Counsel for the defendant No. 1 has submitted that by the orders of Justice A.R Shah, the Court Receiver was directed to-appoint the 1st defendant as his Agent in respect of Shop No. 6 on such terms and conditions as may be fixed by the Receiver but without security. According to the learned Counsel for the defendant No. 1, the Court Receiver could not fix the final amount of compensation/royalty more than the actual rent payable to the landlord for the shop premises in question, i.e. Rs. 169/- per month which his client is ready and willing to pay every month. The learned Counsel further submitted that by charging Rs. 5,000/- per month as the amount of royalty, the Court Receiver is trying to make profit as he would pay Rs. 169/- per month, while he has called upon the defendant No. 1 to pay Rs. 5,000/- per month. According to the Counsel, there is no real basis to charge Rs. 5,000/- per month and that it is only a Rule to Thumb for having determined the amount of royalty. He further submits that to charge the amount of royalty in excess of the rent-is to violate the provisions of the Rent Act also. He has placed very strong reliance on the observations of the. Division Bench of this Court (P.D. Desai, Chief Justice and A.V. Savant, J.) that the amount of royalty cannot exceed the amount of actual rent payable to the landlord. On the contrary, the learned Advocate for the plaintiff has with equal vehemence at her command submitted that the concerned Shop No. 6 is located in the prime locality and the business which is carried on by the defendant No. 1 is earning huge profits and the valuer has given his report assessing the amount of Rs. 7,000/- per month as the amount of royalty which could not have been varied by the Court Receiver, as according to her, if any stranger is to be given this premises, it would fetch an amount of not less than Rs. 12 to 15,000/- per month. According to her, the defendant No. 1 is running his business in the premises and is, therefore, liable to pay at least the amount of royalty which is fixed by the Court Receiver, though it is on a lower side. She has further relied on another judgement of another Division Bench (Pendse and Cazi, JJ.). She has submitted that the learned Judges have fixed the amount of royalty in the said order, regardless of the outgoings of the premises. She pointed out that the outgoings of the premises were Rs. 312/- per month in that case, but the Court had fixed Rs. 1,000/- per month for residential and Rs. 5,000/- for the shop. The learned Judges have reduced the amount of royalty suggested by the Valuer which was Rs. 8,400/- and Rs. 18,000/- per month respectively for the flat and the shop. The learned Counsel, therefore, argued that the order of the then Chief Justice P.D. Desai stands overruled by the Bench presided over by Justice Pendse as then he was. From the aforesaid discussion, it is therefore, crystal clear that the diversity between the parties is very narrow. According to the Defendant No. 1, the amount of royalty cannot exceed the amount of rent payable by the tenant to the landlord and that according to the plaintiff the amount of royalty would depend upon various other factors, such as, the location of the place etc. and further what such a place would fetch if given to a stranger or outsider. By his order, Justice A.P. Shah had appointed the Court Receiver for the Shop No. 6, and had directed him to fix such terms and conditions but not any security. It appears that the Court Receiver understood from this order that he has to fix an amount of royalty also. He has, therefore, fixed Rs. 5,000/- per month the amount of royalty/compensation for the shop after getting a Valuation Report which suggested Rs. 7,000/- per month. The Court Receiver has reduced this amount to Rs. 5,000/- giving some semblance of reasons to reduce the amount of royalty/compensation to Rs. 5,000/- per month. The Valuation Report is based on various factors, such as, situation or location of the property etc. The Division Bench presided over by Justice Pendse has clearly mentioned that it would not be appropriate to fix the royalty amount with reference to the valuation of the properties in the area in which the flat and the shop are situated. The learned Judges have not further elaborated and have not given any positive guidelines for fixing the amount of royalty/compensation for any premises. The present valuation report is based on such factors which amount, according to the Court Receiver himself, was on a higher side and he considered the fact that the Defendant No. 1 being the son of his deceased father and was running the business since last a number of years considered to give some concession. The Division Bench of the then Chief Justice P.D. Desai have, however, very categorically stated that the compensation/royalty receivable shall not exceed the rent payable by the tenant to the landlord in respect of the suit shop. These observations were very categorical though without any elaborate discussion. Since the ratio of this Division Bench is positive and emphatic, it is binding on me. This conclusion or ratio has not been overruled or differed from by the Bench of Justice Pendse. There is not even a reference to the said order of the Bench of the Chief Justice P.D. Desai. There are no positive guidelines or any ratio in the judgement of the latter Bench, which has merely fixed the amount of royalty for the premises without laying down any definite law. Since there are no other precedents cited by any of the parties, I have tried to find out on my own what the concept of royalty is. It is defined in unabridged Random House Dictionary. The relevant part of the definition is "A compensation or portion of the proceeds paid to the owner of a right, as a patent or oil or mineral right, for the use of it and also an agreed portion of the income from a work paid to its author, composer, etc., usually a percentage of the retail price of each copy sold." The origin of the word ''royalty'' is to be found out from this definition itself. It is the sovereign power which granted permission to a private person or citizen to use its mine or lands, may be in the beginning, Charging such a person a specific amount for the permission to use such lands or mines owned by the sovereign power which was the royal power, the payment made to such a royal power for the use of the lands of mines for mineral appears to have been named, as Royalty. In the course of the time, this concept appears to have been accepted by the other owners of a right which they gave it to others for the use and the amount of compensation which the owners received was called following the language of the royal power, i.e. royalty. Like the Royal Houses, even a private citizen appears to have borrowed the language of royalty for compensation. It is further clear from the definition that not only the owners of a right as a patent or oil or mineral right, but even authors of some literary or lyric works started getting a percentage of the retail price on each copy sold, and such an income was also labelled as royalty. It appears that the concept of royalty is to compensate a right of an owner or property who permits or allows others to use his rights from his property. It is thus crystal clear that the amount of royalty or compensation is to be paid to the owner and no one else. In the Court proceedings, it appears that to safeguard the rights of the parties till their rights are finally adjudicated, the users of such rights or property are required to pay or part with a specific amount to be kept with a third party, i.e., in the present case the Court Receiver, who would preserve such rights or properties during the pendency of the litigation. According to me, therefore, the royalty is to compensate the owner of a right or a property and it cannot exceed the concept of compensation. To compensate means to make good the loss. It cannot be said that by asking 10 times more the amount would amount to compensate. To compensate means to restore the person to his position to which he otherwise would have been placed at. In the present kind of litigation, the owner is yet to be adjudicated or decided and, therefore, there cannot be any question of compensation to anyone.

4. In the transaction of patent, royalty is a payment to a patentee by agreement on every article made according to his patent or to an author by publisher on every copy of his book sold or to the owner of mineral for the right of working the same on every tone or other weight raised. It is a pro-rata basis to a grantor or lessor on the working of the property leased or otherwise on the profits of the grant or lease. As I have already observed, the word royalty is especially used in preference to mines patents and copy rights. In its real and original sense, royalties were the payments which the Government or the royal power could demand for the appropriation of minerals, timber or other property belonging to the Government or the royal power. We find analysis of the word royalty in the following decisions of the Supreme Court as well as other High Courts :

1. Bherulal Vs. State of Rajasthan and Another, .

2. Surajdin Laxmanlal Vs. State of M.P. and Others, .

3. Laddu Mal and Others Vs. The State of Bihar and Others, .

4. H.R.S. Murthy Vs. Collector of Chittoor and Another, .

5. State of Orissa and Others Vs. Titaghur Paper Mills Company Limited and Another, .

6. M/s. Continental Construction Ltd. Vs. Commissioner of Income Tax, Central-I, .

5. The underlying common frame in all the aforesaid judgments is the same as is defined; in Jowitt''s Dictionary of English Law, which is not very different from the definition given in the Random House Dictionary. As the Supreme Court has observed that the royalty is generally a consideration paid to the owner of right or asset, such as, copyright patent right, mining right etc. for the privilege of

using it for one''s own purposes, the meaning and shades have been changing in the context of different Acts" which came to be interpreted in the aforesaid judgments.

6. I, however, did not find any decision, nor was any cited before me to help me conclude the issue which is before me. The ownership of the Shop No. 6 is yet to be decided. During the pendency of the litigation, the property must be preserved. The Courts appoint Court Receivers for preservation of the property till the rights are finally determined after adjudication. From this angle, the concept is somewhat different. As is seen, royalty is always charged by the undisputed owner of a right or a property. As is presently seen, where the ownership rights are not determined, it is the duty of the Court to preserve the property and to preserve the property, the Court appoints its own agent, i.e., the Court Receiver. The Court Receiver is entrusted with the duty to take every such action which would protect the property. Since there are no judicial guidelines laid down anywhere, everyone gropes in the dark and some amount of royalty is fixed without any real basis. As is presently seen, the Valuation Report had suggested Rs. 7,000/- per month, while the Court Receiver has reduced it to Rs. 5,000/ - per month but the reduction is not based on any cogent and legal basis. More or less, it is the ipse dixit of the person taking such a decision. It is also clear from the judgment of the Division Bench presided over by Justice Pendse, wherein the amounts of royalties for residential flat and shop have been reduced to a large extent, but without any guidelines. It is, therefore, clear that the Court Receiver in his endeavour to protect the property cannot seek to make any profits as an agent of the Court. No doubt, he has to take all the necessary steps to preserve and protect the property, but while doing so, he cannot profiteer in the name of fixing royalty to be paid by his agent who is also a party to the litigation. According to me, the Court Receiver in the present case could not have called upon the defendant No. 1 to pay a sum of Rs. 5,000/- per month as royalty. He has fixed a term or a condition as per the direction of Justice A.P. Shah, which is far from being reasonable and has no nexus or basis anywhere. To preserve the tenancy rights of the Shop No. 6 what is required is only payment of monthly rent to be paid regularly to the landlord and to comply with the agency agreement with the Court Receiver and the provisions of the Bombay Rent Act. According to me, in the aforesaid circumstances, the Court Receiver is not entitled to charge more than the rent as the amount of royalty. In the present case, he could charge only Rs. 169/- per month, which is the rent payable to the landlord to preserve the tenancy rights of the tenants. The royalty cannot exceed the amount of rent payable to the landlord.

7. I, however, do not fix the amount of Rs. 169/- as royalty payable to the Court Receiver by the defendant No. 1 as the defendant No. 1 himself has admitted to pay Rs. 750/- per month to the Court Receiver, so that from the balance amount, the Court Receiver can try to meet other expenses of his office.

8. I, therefore, made the Chamber Summons absolute in terms of prayer Clause

(b) and (c). The defendant No. 1, however, has to abide by the other orders of the Court Receiver, such as, deposit of 3 months by way of security deposit and for execution of the agency agreement. The Court Receiver shall adjust the account of the defendant No. 1 on the basis of the aforesaid directions in respect of payment of the royalty by the defendant No. 1. The defendant No. 1 to execute the Agency Agreement, within four weeks from today, failing which, the Court Receiver shall be entitled to take forcible possession of the premises. The Chamber Summons is disposed of. No order as to costs.

Certified copy is expedited.

The Court Receiver shall act on an ordinary copy of this Order duly authenticated by the Associate of this Court.

9. Chamber Summons disposed of.