

(2013) 09 BOM CK 0139

In the Bombay High Court

Case No : Chamber Summons No. 1586 of 2010 in Suit No. 1989 of 1995

Sanjeev Alias Sanjay Subash Grover

APPELLANT

Vs

Vertex Trading Co., Jayketu Vasudev Joshi and The Court
Receiver

RESPONDENT

Date of Decision : 06-09-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1

Citation : (2013) 6 ALLMR 8

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Pankaj Savant instructed by M/s. M.V. Kini and Co, for the Appellant;
J.P. Sen, Simil Purohit and Ms. Mehek Bookwala instructed by M/s. Thakore
Jariwala and Associates, for the Respondent

Judgement

R.D. Dhanuka, J.—By this chamber summons, plaintiff seeks modification of order dated 24th August 2010 passed by learned Court Receiver fixing the royalty at Rs. 45,000/- and seeks enhancement of royalty at Rs. 2,23,208.40 ps. Plaintiff also seeks liberty to withdraw the royalty amount deposited and direction to the parties to share professional fees of the Valuer charged at Rs. 1,00,000/- in equal proportion. It is the case of the plaintiff that the predecessors of the plaintiff had given a portion of the suit premises to the defendants for use of storage facility and they were in possession of the entire suit premises. It is the case of the plaintiff that the license granted to the defendant for storage facility came to an end and defendant continued to occupy the said portion of warehouse illegally. On 6th June 1995, plaintiff filed a suit against the defendant for a declaration that portion of the suit premises was given for use to the defendant for storage facility only and the possession of the entire suit property was with the predecessor of the plaintiff for which municipal storage license was issued in the joint names of the plaintiff's predecessor and defendant No. 2 for storing combustible and inflammable goods in the suit premises.

2. By an order dated 3rd May 2006 passed by the Division Bench of this Court, in respect of Unit No. 14, Ground Floor, Ashish Co. Op. Industrial Estate Ltd., Gokhale Road (South, Dadar), Court Receiver was appointed with all powers under Order 40 Rule 1 of the Code of Civil Procedure. Court Receiver was directed to appoint the defendant as his agent in the first place and to fix royalty and obtain an agency agreement within a period of two months from the date of the said order. Court Receiver appointed Mr. Kishor H. Parkar for the purpose of submitting valuation report for fixing royalty. The said valuer submitted report on 29th May 2006 and arrived at royalty amount at Rs. 22,000/- per month. By an order dated 26th June 2006, Court Receiver fixed an ad-hoc royalty of Rs. 25,000/- per month.

3. On 16th February 2008, plaintiff herein filed a chamber summons (311/08) in this Court in Suit No. 1989 of 1995 for modification of the order dated 20th March 2007 passed by the Court Receiver fixing the royalty at Rs. 25,000/- per month and applied for enhancement of the royalty amount to Rs. 79,000/- per month with liberty to the plaintiff to withdraw the said amount. By an order dated 24th September 2009 passed by this Court, defendant was directed to pay sum of Rs. 40,000/- per month as royalty from the date of institution of said chamber summons and to clear the arrears within 12 weeks from the date of the said order. Liberty was granted to the plaintiff to apply for withdrawal of the sum deposited after the same was made. Being aggrieved by the said order, plaintiff as well as defendant filed two separate appeals being Appeal Nos. 830 of 2009 and 529 of 2009 respectively. By an order dated 5th April 2010, Division Bench of this Court by consent of parties, set aside the order dated 24th September, 2009 passed by the learned single Judge fixing the royalty amount at Rs. 40,000/- per month. By the said order, Division Bench directed the Court Receiver to appoint a Valuer to recommend to the Receiver what would be the appropriate amount of royalty to be paid by the agent. Court Receiver was also directed to supply copies of the valuation reports which were on record of the court Receiver and directed the receiver to ask the valuer to consider those three reports as also to do his own valuation. Both the parties were granted liberty to make their submissions and objections in writing to the Court Receiver. Court Receiver was directed to fix the royalty amount by a reasoned order. Remedy available to both the sides against the order of Receiver fixing royalty amount was kept open. Defendant/agent was directed to pay royalty amount without prejudice to their rights and contentions at Rs. 40,000/- per month till Receiver fixes amount of royalty pursuant to the said order.

4. Court Receiver appointed M/s. H. Mehta & Associates, Architects and Govt. Registered Valuers for submitting Valuation Report and to recommend the royalty amount pursuant to the order passed by Division Bench on 24th June 2010. Valuer certified that the market value of the suit premises was @ Rs. Rs. 2,32,20,840/- and amount of net fair and reasonable royalty to be charged for use and occupation thereof worked out at Rs. 2,32,208.40 ps. per month.

5. By an order dated 24th August 2010, Court Receiver High Court Bombay fixed the royalty amount in respect of suit property at Rs. 45,000/- per month excluding all outgoings and directed the defendants to pay the royalty @ Rs. 45,000/- per month from 1st September 2010 onwards.

6. Being aggrieved by the said order dated 24th August 2010 passed by learned Court Receiver fixing the royalty amount at Rs. 45,000/- per month, plaintiff has filed this chamber summons for modification of the said order and for enhancement of the royalty in the sum of Rs. 2,32,208.40/- per month as recommended by the valuer appointed by the Court Receiver pursuant to order passed by Division Bench and also seeks liberty to withdraw the amount deposited on such terms and conditions as this Court deems fit.

7. Mr. Savant, learned counsel appearing for the plaintiff submits that though Division Bench of this Court had directed the Court Receiver to fix the royalty amount after valuation report is submitted by the new Valuer to be appointed pursuant to the said order and after considering the said report, the Court Receiver has not considered the said report and had passed an order fixing the royalty at such a meagre sum of Rs. 45,000/- per month as against the royalty determined by the said valuer at Rs. 2,32,208.40 ps. It is submitted that learned Court Receiver has not rendered any reasons as to why the report submitted by the new valuer appointed pursuant to the order passed by Division Bench was not acceptable. It is submitted that such report submitted by the new Valuer pursuant to the order passed by Division Bench could not have been ignored by the Court Receiver and that also without rendering any reasons. It is submitted that valuation report submitted by new Valuer is absolutely in order and valuation is based on the instances referred and also as per ready reckoner etc., and no fault could be found by the Court Receiver in the said report determining the royalty amount at Rs. 2,32,208.40/- per month. It is submitted that the order passed by the Court Receiver is contrary to the order passed by Division Bench. Learned counsel submits that learned Court Receiver has acted arbitrarily and unreasonably and such order deserves to be set aside. Learned counsel submits that the suit property was designated as commercial area, it had showroom potential, the surrounding galas were being used as showrooms and the photographs taken were enclosed to valuer's reports. The premises are on ground floor which command a better value. The suit premises were situated up market area of Dadar and is well connected by bus and rail, has two lifts including a goods lift, and has showroom potential. There are showrooms of garment with showcase for display at ground floor namely Unit Nos. 11, 12, 13, 15 and 16. Unit-14 is on the same line which could attract a better royalty amount and that was what recommended by the Court Receiver. The garment wholesale market is also situated at Dadar.

8. Mr. J.P. Sen, learned counsel appearing on behalf of the defendants on the other hand submits that the court receiver was right in placing reliance upon the ready reckoner in view of the valuer appointed by this court not having

considered any sale instances and ignored the ready reckoner for the purpose of determining the royalty amount. It is submitted that royalty amount recommended by the valuer could not be for commercial and can't be exorbitant. Learned counsel submits that royalty amount should not be such that it would compel the agent of the Court Receiver to be evicted from the suit premises during the pendency of the said suit. Mr. Sen submits that in the said report submitted by the valuer comprise sale instances which could not be compared as no supporting data is furnished in the said report. It is submitted that there was no basis for determining the market value at Rs. 25,000/- per sq. ft. as considered by the said valuer in the said report. Mr. Sen submits that on the other hand, the court receiver has considered the ready reckoner properly and has given appropriate discount and/or depreciation while determining the amount of royalty. Learned counsel placed reliance on the judgment of this court in case of Super Max International Pvt. Ltd. and another vs. State of Maharashtra and another reported in 2009 (2) Mh.L.J. 134 in support of his submission that the reasonable return on leave and licence basis cannot be more than 6% per annum of the value of the property. Reliance is placed on paragraphs 14 and 15 of the said judgment in support of that submission which reads thus:-

14. The Stamp Duty Ready Reckoner publishes the rates for properties in various parts of Mumbai. In respect of similar properties situated in the same area, the value of the property is stated to be about Rs. 12000/- per sq. ft. Normally, the rates mentioned in the ready reckoner are lower than the actual market rates. In any event, they are seldom higher than the actual market rate. A reasonable return on a leave and licence basis would be not less than 6% of the value of the property.

15. I intend taking an extremely charitable view in the Petitioner's favour while deciding the condition subject to which the execution of the decree is to be stayed. I do so as the possibility of the Respondent recovering the amount determined finally is high considering that the tenant is the State. I will presume on the basis of the Ready Reckoner that the suit property would fetch a rate of Rs. 12000/- per sq. ft. The value of the property which admeasures 9000 sq. ft. would thus be a minimum of Rs. 10,80,00,000/-. Even assuming a rate of return of 6% per annum, it would fetch a sum of Rs. 64,80,000/- per annum or Rs. 5,40,000/- per month. Anything less would be illusory.

9. Mr. Sen also placed reliance on the judgment of the Supreme Court in case of The State of Maharashtra and Another Vs. Super Max International Pvt. Ltd. and Others, in support of his submission that the amount fixed with reference to stamp duty reckoner cannot be doubted. Paragraphs 75 to 78 of the said judgment reads thus:-

75. In Atma Ram Properties the Court framed two issues arising for consideration as follows:

10. This submission raises the following two issues: (i) in respect of premises

enjoying the protection of rent control legislation, when does the tenancy terminate; and (ii) up to what point of time is the tenant liable to pay rent at the contractual rate and when does he become liable to pay compensation for use and occupation of the tenancy premises unbound by the contractual rate of rent to the landlord?

76. The Court answered the first issue as follows:

16. We are, therefore, of the opinion that the tenant having suffered a decree or order for eviction may continue his fight before the superior forum but, on the termination of the proceedings and the decree or order of eviction first passed having been maintained, the tenancy would stand terminated with effect from the date of the decree passed by the lower forum. In the case of premises governed by rent control legislation, the decree of eviction on being affirmed, would be determinative of the date of termination of tenancy and the decree of affirmation passed by the superior forum at any subsequent stage or date, would not, by reference to the doctrine of merger have the effect of postponing the date of termination of tenancy.

The second issue was answered as follows:

(2) With effect from that date (the passing of the decree of eviction), the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree.

We are in respectful agreement with the decision of the Court in *Atma Ram Properties*.

77. In light of the discussions made above we hold that in an appeal or revision preferred by a tenant against a order or decree of an eviction passed under the Rent Act it is open to the appellate or the revisional Court to stay the execution of the order or the decree on terms, including a direction to pay monthly rent at a rate higher than the contractual rent. Needless to say that in fixing the amount subject to payment of which the execution of the order/decreed is stayed, the Court would exercise restraint and would not fix any excessive, fanciful or punitive amount.

78. In the case in hand, the High Court has fixed the amount of Rs. 5,40,000/- per month with reference to the Stamp Duty Ready Reckoner and hence, its reasonableness cannot be doubted. In fairness to Mr. Lalit he did not challenge the fixation of the amount on that ground.

10. Mr. Sen invited my attention to the judgment delivered by this court in Notice of Motion NO. 648 of 2006 in Suit No. 1989 of 1995 in this suit in support of his submission that in the said Notice of Motion which was filed by the plaintiff for appointment of the court receiver in respect of the same premises, this court had

declined to remove the agency of the defendant. It is submitted that this court had also considered the plea of the plaintiff that the defendants had no right in the suit premises, particularly, since their earlier plea that they were tenants has been rejected by the court and upheld right upto the Supreme Court. Mr. Sen also placed reliance on the comparative chart submitted by the learned counsel to demonstrate that in the year 2006 Mr. Kishore H. Parkar, Government approved valuer had recommended royalty of amount of Rs. 22,000/- per month. On 4th August, 2006, Dr. Roshan Namavati, valuer appointed by the plaintiff recommended royalty amount of Rs. 91,181/- per month. On 16th October, 2006 Mr. V.R. Shah, Government approved valuer appointed by the defendant recommended royalty of amount of Rs. 22,825/- per month. Pursuant to the order passed by the Division Bench, Mr. H. Mehta & Associates, Government registered valuer by its report dated 24th June, 2010 recommended royalty of amount of Rs. 2,32,208.40 per month. Court Receiver by the impugned order dated 24th August, 2010 has recommended royalty amount of Rs. 45,500/- per month. It is submitted that there is vast disparity in the valuation and the royalty derived at by Mr. Kishore H. Parkar, Mr. V.R. Shah, Government approved valuers which had recommended the royalty amount of Rs. 22,000/- and Rs. 22,825/- respectively in the year 2006 and the valuation report submitted by Dr. Roshan Namavati in the same year recommending royalty at Rs. 91,181/-. It is submitted that royalty recommended by Mr. H. Mehta & Associates in the month of June 2010 at Rs. 2,32,208.40 is not only exorbitant, excessive, arbitrary but is without any basis.

11. On perusal of the order passed by the Division Bench on 5th April, 2010, it is clear that earlier order passed by this court directing the respondents to pay royalty at the rate of Rs. 40,000/- per month came to be set aside by consent of parties with a direction to the court receiver to appoint the valuer to recommend the amount of royalty to be paid by the agent. Court receiver was directed to provide copy of that report to both parties to enable them to make their submissions and objections in writing to the court receiver. Court receiver was directed to fix amount of royalty by a reasoned order. Remedy available to both sides against order of receiver fixing royalty amount was kept open. On perusal of the order passed by the court receiver, it is clear that the court receiver has not rendered any reasons in the impugned order as to why the report submitted by M/s. H. Mehta & Associates appointed pursuant to the order passed by the Division Bench of this court could not be accepted or the royalty amount recommended by the said earlier order could not be considered as correct. On perusal of the order passed by the court receiver, it is clear that except making an reference to the said report submitted by M/s. H. Mehta & Associates, court receiver has not discussed about the said report and did not render any reasons in the said report rejecting the report given by the said valuer appointed by the court receiver pursuant to the order passed by the Division Bench. In the impugned order, the court receiver has merely considered the stamp duty ready reckoner for the year 2010 and has considered 80% of the rate applicable to the

shop in that zone in which the suit shop is situated. The court receiver has also considered 8% return and has determined the said amount at Rs. 45,000/- per month payable from 1st September, 2010. On perusal of the report submitted by M/s. H. Mehta & Associates, it is revealed that property consist of commercial premises presently being used as godown by the defendant company and also consist of loft within the said premises. The registered valuer had also considered location of the suit premises which is about 20 minutes walking distance from Dadar railway station and 5-7 minutes walking distance from Elphinstone Road railway station of local Western Railway, on West side. The valuer has also inspected the suit premises and has taken measurements and photographs of the suit property as well as the building in which it was situated. The carpet area of the suit unit is 740 sq. ft. and the built up area thereof is 863 sq. ft. with a loft admeasuring about 226.72 sq. ft. having clear height of 1.98 meters. In the said report, the valuer has also considered an instance of the Life Insurance Corporation paying rent during 2008-2009 and onwards of Rs. 19,18,111/- for the carpet area of 5,458.32 sq. ft. for office premises situated at first floor in the building known as Laxmi Commercial Centre at Tulsi Pipe Road, Dadar (West), Mumbai and by applying the said instance, the rate of rent worked out at Rs. 351.41 per sq. ft. of carpet area and at Rs. 292.84 per sq. ft. of built up area. The valuer has considered the reproduction method and deducted therefrom depreciation for the age of construction. The valuer has then considered the rate of ownership commercial premises at the ground floor at Rs. 16,338.29 per sq. ft. if built up area, as per ready reckoner 2010. It is also stated in the report that the said valuer made an enquiry and it was revealed that presently the rates of similar units in the same building at ground floor are in the range of Rs. 25,000/- to Rs. 30,000/- per sq. ft. of built up area. Accordingly the valuer adopted the rate of Rs. 25,000/- per sq. ft. for the purpose of reproduction value considering that generally the basement is valued at 80%, mezzanine floor is valued at 70% and open terrace above shop or office is considered at 40%, loft facility is considered at 40% of the basic rate of built up premises. The valuer has considered 40% rate i.e. Rs. 10,000/- per sq. ft. of loft area. After deriving Rs. 2,38,42,200/- as reproduction value considering the market value of the unit of Rs. 25,000/- in respect of area of 863. sq. ft. and at the rate of Rs. 10,000/- per sq. ft. towards area of lofts admeasuring about 226.72 sq. ft. and after deducting 40% depreciation out of the same amount, the valuer arrived at the figure of Rs. 2,32,20,840/- as the present market valuation of the said unit. The valuer thereafter considered the rate of interest in the nationalised and co-operative banks, govt. bonds, mutual funds and other investments in the range of 8.50 to 9.50% per annum for long term investments and prime lending rate of the banks are about 12.50%. The valuer considered 12% per annum as the rate of interest at the rate of valuation of the said suit premises for calculation of royalty. Rate of return accordingly arrived at by the valuer at Rs. 2,32,208.40 per month. On perusal of the said report and the reasoning given by the valuer, it is clear that even the valuer has not furnished any details in the said report about the market rate considered at Rs. 25,000/- to Rs. 30,000/- on page 6 of the report. It is only

stated that the said amount is revealed on making enquiry. No documentary evidence is referred in the said report for arriving at such amount. As far as instance of rent being paid by the Life Insurance Corporation referred in para (11) of the said report is concerned, it appears that the said amount is being paid on the built up area of 6,549.98 sq. ft. whereas area of suit shop is 863 sq. ft. Considering the difference in the size in the commercial shop, the valuer in my view could not consider the rent being paid by the Life Insurance Corporation as the comparable instance.

12. It is not in dispute that the proceedings filed by the defendants for declaring them tenants in respect of the suit premises has been dismissed right upto the Supreme Court. Question that arises for consideration of this court is whether royalty amount liable to be paid by the agent should be on the basis of the standard rent payable by the tenant or it shall be equivalent to the mesne profit derived on passing a decree against the trespassers. Supreme Court in case of State of Maharashtra and another vs. Super Max International Private Limited and others has held that even in the appeal or revision preferred by a tenant against an order or decree of an eviction passed under the Rent Act it is open to the appellate or the revisional court to stay the execution of the order or the decree on terms, including a direction to pay monthly rent at the rate higher than the contractual rent. While fixing the amount subject to payment of which the execution of the order/decreed is stayed, the court would exercise restraint and would not fix any excessive, fanciful or punitive amount.

13. Though the Division Bench has directed the court receiver to appoint the valuer for recommending the amount of royalty and was directed to render reasons while determining the amount of royalty court receiver has not discussed the reasoning rendered by the valuer in the impugned order. At this stage, I am not inclined to remand the matter back to the Court Receiver for considering the report submitted by the valuer again and to determine the amount of royalty afresh. Issue of determination of royalty amount is pending since more than three years. Considering the fact that in the Chamber Summons filed by the plaintiffs in the month of February 2008 it was prayed for payment of royalty amount at Rs. 79,000/- per month as against the royalty amount of Rs. 25,000/- fixed by the Court Receiver and considering the report submitted by the said valuer about location, area, commercial potential and also considering the fact that the claim of tenancy made by the defendant has been negated all throughout, in my view royalty amount at Rs. 90,000/- per month can be considered as reasonable. In my view, royalty amount cannot be fixed with 100% accuracy. As has been noticed, three valuers in three different reports in respect of the same property, have suggested different amounts in respect of the same property in the same year. Considering the fact that the payment of royalty would be ad-hoc arrangement during the pendency of the suit considering the valuation report as well as ready reckoner, in my view payment of Rs. 90,000/- per month would be reasonable and is determined accordingly. I have also considered the fact that issue of tenancy raised by the defendant in respect of

the suit property has been concluded against defendant. Impugned order passed by the Court Receiver is accordingly modified and is substituted by an order and direction directing the defendant to pay royalty amount at the rate of Rs. 90,000/- per month w.e.f. 1st September, 2010 onwards. Defendant is directed to deposit the arrears of the royalty within eight weeks from today. Plaintiffs would be at liberty to withdraw the said royalty when deposited by the defendant within four weeks of such deposit on furnishing bank guarantee of a nationalised bank in favour of the Prothonotary and Senior Master of this court. Chamber Summons is disposed of in the aforesaid terms. Parties are also directed to share the professional fees paid to the valuer as claimed equally. No order as to costs.