

(1988) 01 BOM CK 0060

In the Bombay High Court

Case No : Civil Review Application No. 13 of 1987

Tarquino Raul Henriques

APPELLANT

Vs

Damodar Mangalji and Co. Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 13-01-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, 113, 2(12), 2(17), 34

Citation : AIR 1989 Bom 309

Hon'ble Judges : G.D. Kamat, J

Bench : Single Bench

Advocate : M.S. Usgaoncar and V.B. Thaly, for the Appellant; A.J. Kenkre, for the Respondent

Judgement

1. This review application by the applicant in Civil Revision Application No. 80/87 seeks to obtain a review of the judgment dt. Sept. 18, 1987. On setting aside the order made by the lower Court by my judgment. I directed the present respondents to pay Rs. 4000/- per annum as and by way of mesne profits from the date of the institution of the suit till the delivery of the possession of the property i.e. from the year 1969 up to 1978 the amount comes to Rs, 40,000/- and Rs. 1066/- from Jan. 1979 to May, 1979 till the property was handed over to the present applicant. The controversy now centers around not granting the interest on the mesne profits.

2. The foremost contention of the learned counsel Shri Thali for the applicant is having regard to the very definition of mesne profits In S. 2(12) of the Civil P.C. 1908 in grant of interest is implicit besides being a substantive right and therefore it was clearly incumbent upon the Court while directing the respondents to pay the mesne profits also to order interest thereon read with S. 34 of the Code.

3. Next contention is that this review application is maintainable as it is still open to this Court to grant interest as the impugned judgment suffers from error apparent on the face of record inasmuch as the Court while disposing of the Civil

Revision Application No.80/87 did not take into consideration the question of ordering payment of interest at all. It is urged that this is not a case of passing an erroneous order which is beyond review or which cannot be reviewed at all.

4. A number of authorities have been relied upon by the learned counsel Shri Thali in support of the propositions canvassed to get the impugned judgment reviewed. I shall however touch them after recording the vehement opposition made on behalf of the respondents by their counsel Shri A. Kentre.

5. Shri Kenkre urges that in the first instance it be noticed that at no stage in the suit and despite the checkered history of the case and even during the course of the arguments when the impugned judgment was made a prayer for grant of interest on the mesne profits was ever made. That having not been done it is argued that it is just not possible to grant a new prayer in a review application. Secondly according to the learned counsel the grant of interest is discretionary and once the impugned judgment is silent on the point of interest It is safe to assume that the interest was negatived.

6. Let me now take stock of the authorities relied upon. The first in line is the decision of *Lalta Prasad v. Sri Ganeshji* reported in AIR 1922 All 117. The proposition laid down by this authority by the Division Bench is where a decree granting mesne profit says nothing about interest. The decree-holder can claim that the decree for mesne profits carries interest.

Next is the decision in AIR 1937 143 (Privy Council) . This decision turns more on the question as to whether two different rates of interest are permissible and while holding in the negative it is laid down that there ought to be a uniform rate of interest with regard to the meanse profits. It has been further observed that the grant of rate of interest on mesne profits is discretionary with the Court but discretion should proceed on sound principle.

Next in line is the decision in *Mahant Narayana Dossjee Varu Vs. The Board of Trustees, the Tirumalai Tirupati Devasthanamas, Tirupathi*, . In the decision, the Andhra Pradesh High Court held that interest is, under the express terms of the definition in S. 2(12) made part of mesne profits and further that S. 34 of C.P.C. is not in conflict with the definition of mesne profits under the code. It further observes that interest payable under the definition of mesne profits is a substantive right, whereas the interest payable u/s. 34 is a matter of procedure and that way discretionary.

The last decision on the point relating to interest is again the same case which is decided by the Supreme Court in appeal and reported in AIR 1865 SC 1231 of this report having regard to the definition of mesne profit in the Code it is observed that the interest is an integral part observed that the interest is an integral part of mesne profits and therefore to be allowed for the computation of the mesne profits itself. This is based on the principle that the person in wrongful possession appropriating income from the property himself gets the benefit of the interest of such income.

7. This authority has been equally relied upon by the learned counsel Shri Kenkre for the respondents and according to him on reading para 14 of that report it becomes clear that the award of interest on mesne profits is discretionary. He however concedes that once the discretion is used soundly in the matter of either granting or negating is there may not be any interference by the hierarchal Court but the grant of interest it not implicit in an order for mesne profits.

8. Having regard to all these authorities it may have to be decided whether the grant of interest is implicit when an order for mesne profits is directed S. 2(12) of C.P.C. defines mesne profits to mean those profits which the person in wrongful possession of such a 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. Having regard to the authorities reported in Mahant Narayana Dossjee Varu Vs. The Board of Trustees, the Tirumalai Tirupati Devasthanamas, Tirupathi, and the observations of the Supreme court in Mahant Narayana Dasjee Varu and Others Vs. Board of Trustees, The Tirumalai Tirupathi, Devasthanam, . Mr. Thali points out that the expression "togethers with interest on such profit" clearly indicates that the mesne profits would not only include the actual damage suffered as a result of wrongful possession, but also the interest accrued thereon and in that sense the mesne profits would always comprise both the damage and the interest. Coming back to the authority of Mahant Narayana Dasjee Varu and Others Vs. Board of Trustees, The Tirumalai Tirupathi, Devasthanam, it may be noticed that in para 10 it is observed this (at p. 1235):-

"Under S. 2(12) of the CPC which contains the definition of "mesne profits" , interest is an integral part of mesne profits and has, therefore, to be allowed in the computation of mesne profits itself. That proceeds on the theory that the person in wrongful possession appropriating income from the property himself gets the benefit of the interest on such income."

Regard being had to the dicta and the principle upon which it is based and further having regard to the interpretation of s. 2(12) defining mesne profits I will have no scope to hold otherwise. I must therefore hold that the grant of interest is implicit in the mesne profits. However, the question as to the rate of interest is entirely a question based by the sound discretion of the Court.

9. However, this point does not end here and the next question that assumes importance is as to whether I am entitled to review the impugned judgment. Again a number of authorities have been relied upon by the learned counsel. Shortly the contention of Mr. Thali for the applicant is that the subject of interest is untouched and having not decided the same one way or the other such aspect of the matter would fall within the ambit and parameters of an error apparent on the face of the record. Factually it is undeniable that while disposing of that revision application despite I quashed the order of the trial Court and awarded mesne profits the impugned order is totally silent on the point of award of interest. It is equally true that an erroneous decision cannot be reviewed under

the provisions of O.47 of the Code. Now it is therefore succinctly pointed out by Shri Thali that there is nothing before the Court to hold that the impugned order was erroneously made as the matter is totally silent on that point and once the interest is implicit in the mesne profits interest must follow and therefore review is a must.

10. The first of the authorities that is relied upon the learned counsel is the decision of *Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh*, . An appeal was taken before the Supreme Court when the High Court rejected a certificate for leave to appeal to the Supreme Court. this was despite in the review matter it was pointed out to the High Court that in respect of earlier order made by the High Court the very High Court had granted certificate for leave to the Supreme Court. the apex Court held that the High Court fell in error in not reviewing the order as in the previous cases of assessment the very High Court had granted certificate for leave to appeal and it was therefore wrongly rejected in the later similar case. While considering the scope, parameters and ambit of what is an error apparent on the face of the record it is observed that there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and decisions which could be characterised as vitiated by "error apparent." "A review is by no means an appeal in disguise where by an erroneous decision is reheard and corrected, but lies only patent error. What is important to be noticed is when it observes (at p. 1373):-

"Where without any elaborate argument one could point to the error to the and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."

11. In the matter of what is an error apparent on the face of the record a few more authorities have been cited and they are *Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh*, . *Vasant Jaiwantrao v. Tukaram Mahadaji*, reported in AIR 1960 Bom 485 . *J.G. Sinkar and Others Vs. State of Maharashtra and Others*, , *State of Gujarat Vs. Consumer Education and Research Centre and Others*, and an unreported decision in Civil Review Application No. 19/81 by the Judicial Commissioner decided on 2nd June, 1982. A single Judge of this Court in AIR 1960 Bom 485 , has taken the view that where a relevant provision of law has been noticed by the Court and that way not considered at the time of passing the order that order can be reviewed. *J.G. Sinkar and Others Vs. State of Maharashtra and Others*, points out that the Supreme Court has already taken the view that which when the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court will revise its judgment, AIR 1971 SC 2161 . The Gujarat High Court observed in *State of Gujarat Vs. Consumer Education and Research Centre and Others*, in *State of Gujarat v. Consumer Education* that while exercising powers of review an error apparent on the face of record must be such as can be seen by one who runs and reads. That is

an obvious and patent mistake and not something which can be established by a drawn process of, reasoning on points on which there may conceivably be two opinions. In the decision of *Moran Mar Basselios Cartholicos* (Supra) it is laid down that non-consideration of an important issue in the case on which depended the title of the plaintiff and the maintainability of the suit is certainly as error apparent on the face of the record.

12. Having regard to all these authorities it is urged by Shri Thali that the mesne profits consist of two parts, firstly the amount of compensation and secondly the interest part of it. He therefore says that interest is also substantive right and since it is linked with the damages by virtue of the very definition and when interest is left out in the order the same is liable to be reviewed for the proposition set out in authorities cited propositions set out in the authorities cited.

13. Shri. Kenkre, counsel for the respondents, however while not disputing the various propositions laid down by the authorities says that the fact in this case remains that no claim for interest cannot be claimed in a review application in the garb of styling it as an error apparent on the face of the record and according to him the parameters of what is an error apparent on the face of the record is set out in a more recent case decided by the Supreme Court in the decision of *Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi*, of this reports clearly lays down that it is well settled that party is not entitled to seek a review of a judgment delivered by the Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. It also equally lays down that there can be no dispute that the review proceeding cannot be equated with the case and the finality of the judgment delivered by the Court will not be reconsidered except when a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. Several authorities have also been considered in this report.

14. I was at first attracted to the argument made by Shri Kenkre on behalf of the respondents that the applicant having not made a claim for interest and further not having agitated the point even during the course of the hearing the question as to grant of interest in review is even now possible. But however as I observed earlier that having regard to the definition of mesne profits the interest in implicit in the damages to be awarded which together make the expression "mesne profits". Now the authorities cited or the second point on an analysis would no doubt point out that if there is any patent mistake or glaring omission in the earlier order the same is liable to be reviewed. This in my view is also clear from the decision relied on by Mr. Kenkre reported in *Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi*, as it observes that the Court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice. Therefore the thrust of the authorities is if a point has not been erroneously decided or never touched in the judgment delivered

and if without any elaborate argument and long drawn proceedings the error could be pointed out such an order is liable to be reviewed. Applying these tests in the present case I am satisfied that all that I have to do is on reading the earlier impugned judgment I have to read the definition of mesne profits. Once I do that I must come to the conclusion that by patent and glaring mistake interest was not awarded and this is without any elaborate argument. This will therefore come within the ambit or scope of an error apparent on the face of the record as this aspect of the matter never found any place in the impugned judgment.

15. The next question that will come forth is the rate of interest. No doubt it has been laid down that the rate of interest is to be based on sound principles. In the present case however the fact remains that the brother of the applicant had let out a building to the first respondent on lease. An open plot of land adjoining that building was utilised by the first respondent for dumping materials like empty gas cylinders, and empty barrels, etc. the property was surrendered to the applicant some times at the end of May, 1979. Since the respondent I made use of the open plot of land merely for the purpose of dumping goods as mentioned earlier in my sound discretion a rate of 14% of simple interest on the mesne profits will justify the ends of justice in the present case.

16. Review application accordingly succeeds. The mesne profits already awarded shall bear simple interest at the rate of 14% per annum from the date the profits accrued till payment. Rule accordingly made. There shall be however no orders as to costs in this Review Application.

17. Petition allowed.