

**Appellant Vs. Respondent**

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**SooperKanoon Citation :** [sooperkanoon.com/76797](http://sooperkanoon.com/76797)

**Court :** Kolkata

**Decided On :** Sep-14-2016

**Judge :** Nishita Mhatre

**Appellant :** Appellant

**Respondent :** Respondent

**Judgement :**

IN THE HIGH COURT AT CALCUTTA Civil Appellate Jurisdiction ORIGINAL SIDE  
Present: The Honble Justice Nishita Mhatre & The Honble Justice Tapabrata Chakraborty A.P.O.55 of 2015 With C.S.199 of 2005 National Insurance Company Limited versus Turner Morrison Limited For the Appellant / Defendant : Mr.Abhrajit Mitra, Sr.Advocate, Mr.Abhijit Gangopadhyay, Advocate, Ms.Supriya Dubey, Advocate.

For the Respondent / Plaintiff : Mr.Utpal Bose, Sr.Advocate, Mr.Ashis Kr.

Mukherjee, Advocate, Mr.Sushil Kr.

Sewak, Advocate.

Hearing is concluded on : 29.08.2016.

Judgment On : 14th September, 2016.

Tapabrata Chakraborty J.

: This appeal is directed against a judgment and order dated 12th December, 2014 passed by the learned Single Judge in GA405of 2013 and GA265of 2013 arising out of CS199of 2005.

The undisputed facts are that the plaintiff / respondent filed Civil Suit No.199 of 2005 for recovery of possession of the suit premises from the defendant/appellant and for mesne profits.

In the said suit a decree was passed on 10th July, 2008 for eviction of the appellant from the suit premises and for an enquiry into the mesne profits under Order 20 Rule 12 of the Civil Procedure Code (hereinafter referred to as CPC).Aggrieved thereby, the appellant preferred an appeal which was dismissed by an order dated 10th December, 2008, however, the Honble Appeal Court stayed the operation of its judgment and order for a period of four months subject to the appellant paying occupation charges at the rate of Rs.1.5 lakhs per month with retrospective effect from 10th July, 2008.

Subsequent thereto, an application was filed for appointment of Commissioner to enquire into the mesne profits and by an order dated 12th February, 2009, the Court appointed an Advocate/Commissioner.

Upon conducting an enquiry the Commissioner published his report on 6th October, 2012.

Thereafter, the respondent made an application being GA265of 2013 for a final decree in terms of the report and on or about 31st January, 2013 the appellant made an application being GA405of 2013 for setting aside the Commissioners report.

Both the said applications were heard and disposed of by a common judgment and order dated 12th December, 2014.

Records reveal that the Commissioner enquired into the mesne profits for the period from 1st July, 2005 till 2nd March, 2009 when the possession of the suit property was delivered by the appellant to the respondent.

In course of such enquiry the respondent filed a formal application in Court with a prayer, inter alia, to grant the Commissioner summary power to deal with the matter in awarding mesne profits by dispensing with taking of formal evidence, if necessary.

In the said application being GA1716 of 2009, an order was passed on 2nd September, 2009 by which the Honble Court directed, inter alia, that This Court does not deem it appropriate to fetter the learned Commissioner in any manner.

It is for the Commissioner to decide whether or not formal evidence is necessary. Aggrieved by the said order the respondent preferred an appeal being APOT371 of 2009 with GA2617 of 2009 and in the same an order was passed on 21st October, 2009 directing, inter alia, that So far as third party disputed documents are concerned, the learned Commissioner shall be given liberty to make an enquiry in respect of those third party documents and shall give his opinion in respect thereof and file a report to that extent.

The learned commissioner shall also invite the parties to admit their respective documents which were disclosed before him. Thereafter on 6th May, 2010, while dealing with an application filed on behalf of the appellant, it was decided by the Commissioner, inter alia, that In view of the aforesaid I am of the opinion that the aforesaid Agreements in question are not sufficiently stamped and as such cannot be taken on evidence.

The said Agreements cannot be considered for any purpose whatsoever in view of the law laid down by the Honble Apex Court in the case reported in AIR 2009 SC1489 While coming to the aforesaid conclusion I need not discuss all other judgments as cited on behalf of the Judgment debtor.

The aforesaid Agreements will, however, be on record as Not Admitted. In the Commissioners report it was observed that question of impounding agreements does not arise inasmuch as originals of the said agreements were not produced.

Photocopies of the said agreements annexed to the affidavit of evidence, were sought to be tendered as Exhibits on behalf of the respondent to which an

objection was raised and on the prayer of the appellant direction was given for inspection of the original documents.

In couRs.of the said proceedings the other documents which were produced by the respondent and were marked as Exhibits have been detailed in paragraphs 24 of the Commissioners report.

On behalf of the respondent reliance was placed upon the agreements which could not be taken on evidence and were recorded as Not Admitted and also upon the documents marked as Exhibits and as detailed in paragraph 24.

Mr.Mitra, learned senior counsel appearing for the appellant argues that the Commissioner having arrived at a categorical finding that the agreements dated 21st October, 2002, 6th August, 2007, 6th May, 2012, 1st April, 2005 and 6th February, 2003 are not sufficiently stamped and that as such the said agreements cannot be taken on evidence and that the said agreements cannot be considered for any purpose whatsoever in view of the law laid down by the Honble Apex Court in the case of Avinash Kumar Chauhan -versus Vijay Krishna Mishra, reported in AIR 2009 SC1489 the Commissioner could not have taken into consideration the self-same agreements for the purpose of determination of gross rent at the time of passing the final order on 6th October, 2012 and such apparent contradiction renders the final order to be unsustainable in law.

Being oblivious of such contradictions on record the learned Single Judge upheld the Commissioners report.

He further argues that the rent receipts and other documents pertaining to the unregistered agreements have no value as Section 91 of the Evidence Act clearly bars adducing of any evidence other than the agreement itself for the purpose of proving the terms of the agreement.

The learned Single Judge erred in law in affirming the Commissioners report prepared upon granting credence to the rent receipts and the documents pertaining to the inadmissible agreements.

According to him the learned Single Judge erred in law in not rejecting the Commissioners report since while determining the mesne profits the Commissioner failed to appreciate the fact that the respondent adduced evidence in respect of a tenant, namely, IndusInd Bank, whom the respondent, as landlord, has given a large number of facilities like installing V-SAT Antenna on the roof, advertising signboard on the wall of the building, digging pit for different purposes on the ground of the premises, which facilities are in no way comparable and the rent paid by such a privileged tenant cannot be considered for determining mesne profits.

In support of his arguments reliance has been placed primarily on the judgements reported in the case of Atul Krishna Bose -versus Zahed Mandal, reported in AIR1941 Cal 102 and in the case of National Radio and Electronic Co.LTD.-versus Motion Pictures Association.

Per contra, Mr.Bose, learned senior counsel appearing for the respondent submits that it is not a fact that only on the basis of the unregistered agreements the gross rent had been determined by the Commissioner.

It would be explicit from the report itself that the Commissioner took into consideration the exhibited documents and the determination was not restricted to the agreements only, which were objected to as being inadmissible by the appellant.

Fact remains that the said agreements in serial nos.1 to 5, as detailed in paragraph 69 of the report of the Commissioner, were also relied upon by the appellant, as would be explicit from the report of the D/W (Exhibit-1) and the original copies of the documents, as annexed to the evidence on affidavit affirmed by Krishna Kumar Biyani on behalf of the respondent, were taken inspection of by the appellant.

He further argues that there is no dispute that the agreement at serial no.6 in paragraph 69 of the Commissioners report (IndusInd Bank Limited) was duly stamped and registered in pursuance whereof the IndusInd Bank LTD.was paying rent at the rate of Rs.90 per sq.

ft.

per month and that all the tenants in the premises concerned were also making payment towards maintenance and common service afforded by Graham Trading Company (India Limited) and upon summing up the rents being paid by the said tenants, the gross rent was determined by the Commissioner.

Reliance was also placed upon a chart showing details of tenancy agreement floor wise, the names of the tenants, the respective areas occupied by them and the present rent being paid by them inclusive of maintenance and common service.

The certificate to that effect was tendered in evidence and marked as Exhibit-R and on the basis of the same the respondent claimed mesne profit at the rate of Rs.70 per month per sq.

ft.

for the period from July, 2005 to March, 2009.

According to Mr.Bose, there is no infirmity in the report filed by the Commissioner and upon due consideration of the arguments advanced, the learned Single Judge rightly affirmed the report of the Commissioner.

The rent claimed by the respondent was of Rs.70 per month per sq.

ft.

and such claim of the respondent was not accepted by the Commissioner, who upon adopting two different methods determined the mesne profits.

The first method was calculation of average of rent of two tenancies in the mean year, i.e., 2007 and relied upon by the parties.

The second method was calculation of the average of rent during the mean year of 2007 of the relevant period of five years of the six tenancies relied upon by the parties.

As per the fiRs.method the average gross rent was determined to be of Rs.56 per month per sq.

ft.

whereas by the second method the gross rent was determined of to be of Rs.55 per month per sq.

ft.

and upon calculating an average the gross rent was determined to be of Rs.56 per month per sq.

ft.

It is, thus, explicit that a logical and a reasoned decision was adopted by the Commissioner and there is no infirmity in the decision making process.

Drawing the attention of this Court to the deposition tendered by DW1, Mr.Bose submits that it would be explicit therefrom that DW1 could not inspect the office premises of National Insurance Company on 27th April, 2008 and he did not make any subsequent endeavour to inspect the premises and that as such no weightage can be granted to such deposition as tendered on behalf of the appellant.

In reply, Mr.Mitra argues that the IndusInd Bank LTD.agreement was executed on 8th May, 2009 and as such the same ought not to have been clubbed with agreements executed prior to the year 2007 and that the escalation @ 15% every three years was not deducted in back calculating the rent for the year 2007.

Heard the learned advocates appearing for the respective parties and considered the materials on record.

A perusal of the report filed by the Commissioner reveals that the scope of enquiry was for the period from 1st July, 2005 till 2nd March, 2009 and the mean year of the aforesaid year was 2007.

As regards the methods adopted by the Commissioner for ascertaining the mesne profits no objection has been raised in couRs.of hearing but the main plank of argument of the appellant is that in determining the gross rent as per the two separate methods, the Commissioner erred in law in taking into consideration the tenancy agreements which were admittedly unregistered and unstamped and that the said Commissioner himself in his earlier order dated 6th May, 2010 observed that the said unregistered and unstamped agreements could not have been taken into consideration for any purpose whatsoever.

Such argument on behalf of the appellant has been rightly discounted by the learned Single Judge since the rate of gross rent was ascertained not only on the basis of the exhibited documents as detailed in paragraph 69 of the report but also on the basis of the photocopies of the bill of rent, service and maintenance charges, the collection register of the respondent, the photocopy of the bill register, the paying slips and the bank statements marked as exhibits and also on the basis of IndusInd Bank LTD.document, which was a registered and a stamped document.

Furthermore, the agreements in serial nos.1 to 5 in paragraph 69 were relied upon by the appellant also, upon taking inspection, as would be evident from the report of the D/W (Exhibit-1).Having placed reliance upon the self-same agreements, the appellant cannot turn back and challenge the admissibility of the said agreements.

Under the law a document is required to be properly stamped and registered before it can convey title to the vendee.

However, a document, even though not admissible in evidence, can be looked into for collateral purposes.

In the present case the collateral purpose to be seen is the rent prevailing in the properties adjacent to the property in question and acceptance of the same as one of the yardsticks towards assessment of the gross rent, cannot be said to have vitiated the Commissioners report.

The report filed by the Commissioner stands fortified with appropriate reasons and the same is neither arbitrary nor can be construed to be a boon for the landlord and a bane for the tenant.

The judgement delivered in the case of Atul Krishna Bose (supra) is distinguishable on facts inasmuch as in the instant case the respondent placed reliance not only upon the rent receipts to demonstrate the rent being paid by the other tenants but also upon a whole lot of other supporting documents.

In the case of National Radio and Electronic Co.LTD.(supra).the learned Court was pleased to observe that the finding of the trial Judge was based on no material and was speculative and presumptuous.

In the instant case the determination of mesne profits was based on the basis of a registered lease agreement and also on the basis of other exhibited documents and as such it is not a case of no evidence.

The determination of mesne profits was made on the basis of an accepted mode and as such the judgment delivered in the case of National Radio and Electronic Co.LTD.(supra) has no manner of application in the instant case.

Indisputably the suit premises is comprised on the 3rd floor of the building at premises no.6, Lyons Range, Calcutta-700001, which is accessible from all sides by almost all means of transport and it is situated in the area of Dalhousie and B.B.D.

Bag, the central business district of Kolkata.

The said building is a multi-storied one and various business and corporate houses are having their offices including banks have tenancies and from the Valuers report in Exhibit-R relied upon by the appellant and from the report of the D/W marked as Exhibit-1 it would be explicit that the building is a well-maintained one, having two lifts.

It is well settled that a person who is deprived of a right to possess a property is not only entitled to receive possession of the property but also damages for

wrongful possession from the person who had occupied the property wrongfully and illegally.

The mesne profit is meant to be a compensation, which is penal in nature.

The object of awarding a decree for mesne profits is to compensate the person who has been kept out of possession and deprived of enjoyment of the property even though he was entitled to possession thereof.

Since mesne profit is in the nature of damages, no invariable rule governing its award and assessment in every case can be laid down and the Court may mould it according to the justice of the case [See the judgment delivered in the case of Lucy Kochuvareed -versus P.

Mariappa Gounder and otheRs.reported in (1979) 3 SCC150.

There exists hardly any uniform and standard pattern of assessment of mesne profits.

Comparative assessment of the nature, location, accessibility to the main road, facilities, age of the suit premises on the one hand and similar characteristics in surrounding area on the other hand, would be a relevant factor in assessing the mesne profit.

Such determination of the amount of mesne profits must receive a liberal and purposive construction and the provisions relating to mesne profit is required to be construed in a manner that is just and equitable.

While determining mesne profits, the Court, need not be over-strict in expecting such proof of the suggested amount as it would accept for holding certain fact being established.

Applying such proposition of law to the facts of the case, we do not find any infirmity in the decision making process as adopted by the Commissioner towards determination of the mesne profits and the learned Single Judge, upon appropriately weighing the evidence on record and upon considering the relevant fact ORS.as applied by the Commissioner towards determination of the mesne

profits, has arrived at a specific finding and we do not find any illegality or infirmity in the wellreasoned judgment of the learned Single Judge and we have no hesitation to accept the same.

For the reasons discussed above, no interference is called for and the appeal is, accordingly, dismissed.

There shall, however, be no order as to costs.

Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.

(Tapabrata Chakraborty, J.) (Nishita Mhatre, J.)

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