

**(2014) 12 CAL CK 0087**

**Calcutta High Court**

**Case No:** G.A. No. 405 of 2013, Arising out of G.A. No. 265 of 2013 and C.S. No. 199 of 2005

Turner Morrison Ltd.

APPELLANT

Vs

National Insurance Co. Ltd.

RESPONDENT

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**Date of Decision:** Dec. 12, 2014

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 20 Rule 12, 2(12), 9(1)(e)
- Evidence Act, 1872 - Section 91
- Stamp Act, 1899 - Section 33, 33(1)
- Transfer of Property Act, 1882 - Section 106

**Hon'ble Judges:** Arijit Banerjee, J

**Bench:** Single Bench

**Advocate:** Utpal Boses, Sr. Adv., Ashis Kr. Mukherjee and Sandip Agarwal, Advocate for the Appellant; Abhrajit Mitra, Sr. Adv., Satadeep Bhattacharya and Sudeep Pal Choudhuri, Advocate for the Respondent

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**Judgement**

Arijit Banerjee, J.

At all material times the defendant was a tenant under the plaintiff in respect of an area of 10,855 sq. ft. on the third floor of premises No. 6, Lyons Range, Kolkata-01 (hereinafter referred to as "the suit premises").

2. The plaintiff filed CS No. 199 of 2005 for recovery of possession of the suit premises from the defendant and for mesne profit. In the said suit a decree was passed on 10th July, 2008 for eviction of the defendant from the suit premises and for an enquiry into the mesne profits under Order 20 Rule 12 of the Code of Civil Procedure.

3. On 10th December, 2008 the Hon'ble Appeal Court dismissed the appeal preferred by the defendant. However, the Hon'ble Appeal Court stayed the operation of its judgment and order for a period of four months subject to the

defendant paying occupation charges at the rate of Rs. 1.50 lakhs per month with retrospective effect from 10th July, 2008, being the date of the judgment and order of the Ld Single Judge.

4. By an order dated 12th February, 2009 this Court appointed an Advocate Commissioner for the purpose of holding an enquiry into the mesne profits payable by the defendant to the plaintiff.

5. The Commissioner published his report on 6th October, 2012. The operative portion of the report of the Commissioner is set out hereunder:-

"71. Therefore, upon enquiry made on the basis of evidence the best of the aforesaid average of gross Rent (Inclusive of Taxes, Service and Maintenance Charges) is @ Rs. 56.00 p.m. per sq. ft. which if applied to the suit premises measuring 10,855 sq. ft. for 44 months during the relevant period is Rs. 2,67,46,720.00 (10,855 sq. ft. x Rs. 56.00 pm x 44 months).

72. On the basis on the aforesaid findings the Plaintiff/Decree holder, after adjusting the payment of Rs. 5,55,371.30 p. (paid by the defendant/judgment debtor in terms of the order dated 10th December, 2008 of the Hon"ble Appeal Court in APD 294 of 2008), is entitled to Rs. 2,67,46,720.00 - Rs. 5,55,371 p. = Rs. 2,61,91,348.70 p. as mesne profits. The plaintiff/decree holder is further entitled to interest @ 6% per annum on the aforesaid sum of Rs. 2,67,46,720.00 till the payment of Rs. 5,55,371.30 p. and interest @ 6% per annum from the date of payment of Rs. 5,55,371.30 p. interest @ 6% per annum on the reduced sum of Rs. 2,61,91,348.70 p. till the date of actual payment."

6. On or about 19th January, 2013 the plaintiff made an application being GA No. 265 of 2013 for a final decree in terms of the report of the Commissioner. On or about 31st January, 2013 the defendant made an application being GA No. 405 of 2013 for setting aside the Commissioner"s report dated 6th October, 2012. Both the applications were heard together and are being disposed of by the ensuing common judgment and order.

Re: GA No. 405 of 2013 (application for setting aside of the Commissioner"s report)

7. Appearing on behalf of the petitioner/defendant Mr. Abhrajit Mitra, Ld. Senior Advocate submitted that the report of the valuer at page 350 of the brief was prepared at the instance of the plaintiff and ought not to have been relied upon by the Commissioner.

8. Mr. Mitra then submitted that the Commissioner erred in law in proceeding to determine mesne profits on the basis of what the plaintiff could have earned from the suit premises. Section 2(12) of the Code of Civil Procedure requires mesne profits to be determined on the basis of what the defendant actually earned or could have earned from the suit premises. It is the value of the land to the person in wrongful possession that is the guiding factor. In this connection, Mr. Mitra relied

on the decision in the case of [Fateh Chand Vs. Balkishan Das](#), whereof the Hon"ble Supreme Court laid down as follows:-

"17. The other question which remains to be determined relates to the amount of mesne profits which the plaintiff is entitled to receive from the defendant who kept the plaintiff out of the property after the bargain had fallen through. It is common ground that the defendant is liable for retaining possession to pay compensation from June 1, 1949 till the date of the suit and thereafter under O. 20 R. 12(c) C.P. Code till the date on which possession was delivered. The trial Court assessed compensation at the rate of Rs. 140/- per mensem. The High Court awarded compensation at the rate of Rs. 265/- per mensem. In arriving at this rate the High Court adopted a highly artificial method. The High Court observed that even though the agreement for sale of the property was for a consideration of Rs. 1,12,500/- the plaintiff had purchased the property in 1947 for Rs. 63,000/- and that at the date of the suit that amount could be regarded as "the value for which the property could be sold at any time." The High Court then thought that the proper rate of compensation for use and occupation of the house by the defendant when he refused to give up possession after failing to complete the contract should have some relation to the value of the property and not to the price agreed as sale price between the parties, and computing damages at the rate of five per cent on the value of the property they held that Rs. 3,150/- was the annual loss suffered by the plaintiff by being kept out of possession, and on that footing awarded mesne profits at the rate of Rs. 265/- per mensem prior to the date of the suit and thereafter. The plaintiff is undoubtedly entitled to mesne profits from the defendant, and "mesne profits" as defined in S. 2(12) of the Code of Civil Procedure are profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom, together with interest on such profits but do not include profits due to improvements made by the person in wrongful possession. The normal measure of mesne profits is therefore the value of the user of land to the person in wrongful possession. The assessment made by the High Court of compensation at the rate of five per cent of what they regarded as the fair value of the property is based not on the value of the user, but on an estimated return on the value of the property, cannot be sustained. The Attorney-General contended that the premises were governed by the Delhi and Ajmer-Merwara Rent Control Act XIX of 1947 and nothing more than the standard rent of the property assessed under that Act could be awarded to the plaintiff as damages. Normally, a person in wrongful possession of immovable property has to pay compensation computed on the basis of profits he actually received or with ordinary diligence might have received. It is not necessary to consider the present case whether mesne profits at a rate exceeding the rate of standard rent of the house may be awarded, for there is no evidence as to what the "standard rent" of the house was. From the evidence on the record it appears that a tenant was in occupation for a long time before 1947 of the house in dispute in this appeal and another house for an aggregate rent of Rs.

180/- per mensem, and that after the house in dispute was sold, the plaintiff received rent from that tenant at the rate of Rs. 80/- per mensem, and the vendor of the plaintiff at the rate of Rs. 106/- per mensem. But this is not evidence of standard rent within the meaning of Delhi and Ajmer-Merwara Rent Control Act, XIX of 1947."

9. Mr. Mitra also relied on a decision of the Bombay High Court in the case of [Purificacao Fernandes and Another Vs. Hugo Vicente de Perpetuo Socorro Andrade Menezes and Others,](#) . In that case, the Bombay High Court has relied on the Supreme Court decision referred to above and has held that mesne profits are to be calculated on the basis of the advantage the person in unlawful occupation receives by the use of the property.

10. Mr. Mitra then submitted that tenancies on different floors on a commercial building cannot be compared for fixing mesne profits or letting out value. In this connection he relied on a Division Bench judgment in the case of [L. Bhupat Rai and Co. Vs. Bhikhum Chand Sugan Chand,](#) . Mr. Mitra relied on paragraphs 5 and 6 of the said judgment which are set out hereunder:-

"5. It is notorious that rents of business premises in the business quarters of Calcutta vary with the position of the rooms let. The first floor is very much more advantageous than the second floor and the rent of a room on the second floor cannot be a reasonable guide for assessing the rent of a room on the first floor.

6. On appeal the appellate Court was of opinion that the rent payable for rooms on the second floor could not be used as a true guide for ascertaining the rent payable for rooms on the first floor and with that view I entirely agree. There was no other evidence of any kind. That being so it appears to me that there was no material upon which the Rent Controller could arrive at a basic rent as required by S. 9(1)(e). As the tenant had not produced any evidence the application should have been dismissed."

11. Mr. Mitra then referred to the Commissioner's order dated 6th May, 2010 and in particular paragraphs 16, 17 and 21 thereof. He submitted that the Commissioner having formed the opinion that the tenancy agreements referred to in the said paragraphs were not sufficiently stamped and as such could not be taken on evidence, he should not have considered the said agreements for any purpose whatsoever. However, the Commissioner relied on the rent mentioned in the said tenancy agreements which were terms of the agreement and this the Commissioner ought not to have done as this was in violation of Section 91 of the Evidence Act. In this connection, Mr. Mitra relied on the decision of a Single Judge of this Court in the case of [Atul Krishna Bose and Others Vs. Zahed Mondal and Others,](#) . In that case, the Ld. Judge held that a party could not give oral testimony of the rate of rent fixed by an unregistered lease if such lease was for any reason inadmissible in evidence.

12. Mr. Mitra further submitted that since the tenancy agreements sought to be relied upon by the Commissioner were unstamped, the same ought to have been

impounded by the Commissioner. In this connection, he relied on Section 33 of the Stamp Act and on the decision of the Hon"ble Supreme Court in the case of [Government of Andhra Pradesh and Others Vs. Smt. P. Laxmi Devi](#), . In paragraph 16 of the said judgment the Hon"ble Supreme Court held that when a document is produced before a person who is authorized to receive evidence and a person who is in charge of a public office (except a police officer) before whom any instrument chargeable with date is produced, it is the duty of such person to impound the document if it is not duly stamped. The use of the word shall in Section 33(1) of the Stamp Act shows that there is no discretion in the authority mentioned in Section 33(1) to impound a document or not to do so. In other words, it is mandatory to impound such a document.

13. Referring to the lease agreement between the plaintiff and Indusind Bank, Mr. Mitra submitted that the bank was paying a much higher rent to the plaintiff because of several additional benefits given to the bank by the plaintiff which were not given to the other tenants of the concerned building. Furthermore, the tenant could not have given such benefits if it was letting down the suit premises. Hence, the rent paid by the bank to the plaintiff should not have a guiding factor in ascertainment of mesne profits for the suit premises.

14. Finally, Mr. Mitra submitted that the building of which the suit premises is a part, is an old building. The road in front of the building gets waterlogged very easily during the monsoons. Car parking is a big problem in the vicinity of the said building. These disadvantages ought to have been considered by the Commissioner in determining the mesne profits of the suit premises.

15. Appearing on behalf of the respondent/plaintiff, Mr. Utpal Bose, Ld. Senior Counsel, submitted that there is no scope for interfering with the report of the Commissioner. It is a detailed report based on solid evidence. He referred to the valuer's report dated 30th April, 2012 and pointed out that the report was prepared at the instance of the defendant insurance company. As such, the defendant cannot have any grievance if the Commissioner relied on the said report.

16. Mr. Bose further referred to questions 267 and 268 of the deposition of the plaintiff's witness Sri Krishna Kr. Biani and stated that the answers to the said two questions would show that a chart containing the particulars of all the tenancies in the subject premises was handed over by the said Mr. Biani to the Commissioner which provided a realistic estimate of the letting out value of the suit premises.

17. Mr. Bose further referred to the evidence on affidavit filed on behalf of the plaintiff's witness Mr. Krishna Kr. Biani wherein he has furnished the particulars of the rent paid by some of the other tenants in respect of other portions of the subject premises.

18. Mr. Bose referred to questions 22 and 29 of the deposition of Krishna Kr. Biani wherein the witness has deposed that one Bishnu Kr. Agarwal being a tenant in a

portion of subject premises under the plaintiff is paying rent at the rate of 57.50 per sq. ft.

19. Mr. Bose finally submitted that the Commissioner's report is a well documented report and unless there are glaring irregularities in it or unless it can be said to be perverse, the same should not be interfered with. The subject premises is located in the commercial hub of the city and is a prime property. The mesne profits determined by the Commissioner is not at all excessive or unreasonable and is commensurate with the value of the suit premises.

20. I have considered the rival contentions of the parties. I have gone through the report of the Commissioner carefully. The undisputed facts are that the defendant was a tenant in respect of a portion of the third floor measuring about 10,855 sq. ft. of premises No. 6 Lyons Range, Calcutta-01 under an agreement of tenancy dated 31st August, 1987. Initially, Rs. 75,985/- was paid by the defendant as monthly rent at the rate of Rs. 7 per sq. ft. The agreement between the parties stipulated that the rent would increase at the rate of 10 per cent ever three years. According to the plaintiff the last rent paid by the defendant was at the rate Rs. 91,941.85 per month.

21. By a notice dated 19th May, 2005 issued under Section 106 of the Transfer of Property Act, 1982, the plaintiff terminated the tenancy with the expiry of the month of June, 2005. Upon the defendant's failure to vacate the suit premises the plaintiff filed CS No. 199 of 2005 in this Court which was decreed in favour of the plaintiff on 10th July, 2008. By an order dated 12th February, 2009 this Court appointed a Commissioner to determine the mesne profits payable by the defendant to the plaintiff from 1st July, 2005 till the date of possession. Vacant possession of the suit premises was handed over by the defendant to the plaintiff on 2nd March, 2009. In the mean time, an appeal preferred by the defendant came to be dismissed by the Division Bench on 10th December, 2008 by which the Hon'ble Division Bench ordered the defendant to pay Rs. 1,50,000/- per month to the plaintiff with effect from 10th July, 2008 till the defendant vacated the suit premises. At the time of vacating the suit premises the defendant paid Rs. 5,55,371.30 to the plaintiff.

22. The Commissioner invited pleadings from both the parties and allowed the parties and gave the parties full opportunity of adducing evidence which the parties availed of. The evidence adduced before the Commissioner included the particulars of rent paid by other occupants/tenants of the subject premises.

23. Upon consideration of the pleadings and evidence adduced by the parties the Commissioner concluded that the suit premises is situated in the well-known oldest business hub of the corporate sector which is accessible from all sides by all means of transport. The proximity to the Writers' Building was also significant. The building is well-maintained and has two lifts for the visitors.

24. After detailed deliberation the Commissioner was of the opinion that two methods could be adopted for determining the mesne profits. The first was the

average of rents of two tenancies created in the mean year i.e. 2007 and relied upon by the parties. The second method is 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. Going by the first method the average of gross rent arrived at by the Commissioner was Rs. 56 per sq. ft. Going by the second method the average of gross rent arrived at was Rs. 55 per sq. ft. Going by the best of the aforesaid average of gross rent (inclusive of taxes, service and maintenance charges), the Commissioner determined rent of mesne profits at Rs. 56 per sq. ft. per month. By applying the said rate to the suit premises for 44 months the total amount of mesne profits payable to the plaintiff came to Rs. 2,67,46,720. After adjusting the sum of Rs. 5,55,371.30 paid by the defendant in terms of the Hon'ble Appeal Court's order dated 10th December, 2008, the Commissioner concluded that an amount of Rs. 2,61,91,348.70 was payable by the defendant to the plaintiff on account mesne profits. The Commissioner also awarded interest at the rate of 6% per annum since the definition of mesne profits under Section 2(12) of the Code of Civil Procedure includes interest on such profits.

25. The contention of Mr. Mitra that the Commissioner has proceeded on the basis that mesne profits is what that plaintiff could have earned from the suit premises is not correct. The Commissioner has determined the letting out value of the suit premises and has adopted the same as a guide for arriving at the measure of mesne profits. The Commissioner has followed an accepted mode of determination of mesne profits and I find no fault with the same. If the defendant had let out the suit premises it would have obviously let it out at the prevailing market rate. If the defendant let out the suit premises at a lower rate then it would not have been acting with ordinary diligence. It follows that the rent which the defendant would have received had it let out the suit premises by applying ordinary diligence is a measure of mesne profits. This could only mean the market rate of rent and the Commissioner determined exactly the same.

26. I also find it difficult to accept the submission of Mr. Mitra on the basis of Section 91 of the Evidence Act and the case reported in [Atul Krishna Bose and Others Vs. Zahed Mondal and Others](#). The plaintiff relied on not only on the lease/tenancy agreements in respect of the other portions of the subject premises to demonstrate the market rate of rent but also adduced individual evidence to support such market rate of rent. The lease deed with Indusind Bank which was a registered and duly stamped document was a very material piece of evidence in that regard and the defendant could have no objection to the admissibility of such evidence.

27. In view of the aforesaid I am of the opinion that the procedure adopted by the Commissioner for determining the mesne profits is an acceptable procedure and I can find no fault therewith. I also take judicial notice of the fact that the suit premises is located in a prime commercial hub of the city and as is revealed from the evidence on record, the suit premises is well-maintained. According to me, the

measure of mesne profits arrived at by the Commissioner is reasonable and justified.

28. In the premises aforestated, I find no reason to interfere with the Commissioner's report dated 6th October, 2012. The application for setting aside the Commissioner's report accordingly fails and is hereby dismissed, however, without any order as to costs.

Re: GA No. 265 of 2013

29. This is the plaintiff's application praying for a final decree in its favour for a sum of Rs. 2,61,91,348.70 and in respect of interest granted by the Commissioner in terms of his report dated 6th October, 2012.

30. In view of the dismissal of the defendant's application for setting aside the Commissioner's report and in view of my opinion that the amount of mesne profits determined by the Commissioner is fair and reasonable, the plaintiff's application succeeds. There will be a decree for mesne profits along with interest thereon as determined by the Commissioner in his report dated 6th October, 2012.

Conclusion:

31. The two applications are disposed of as indicated above.