



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3627 OF 2001

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1. Zainuddin Abdulkadar Raja)
(deleted/deceased through legal heirs)
- 1(a). Mrs. Batul w/o Zainuddin A. Raja)
- 1(b). Iqbal Zainuddin Raja)
- 1(c). Shabbir Zainuddin Raja)
- 1(d). Mukhtar Zainuddin Raja)
- 1(e). Mrs. Nasim N. Korakhiwala)
2. Smt. Asmabai Faizullabhai Raja)
(deceased, deleted through legal heirs)
- 2(a). Smt. Fatemabai Faizullabhai Raja)
- 2(b). Smt. Ashrafbhai Faizullabhai Raja)
3. Mohammedi Faiuzullabhai Raja)
(deleted since deceased)) ... Petitioners

Versus

1. The Board of Trustees of the Port of)
Bombay, a Statutory Corporation)
incorporated under The Major Port Trust)
Act, 1963, as amended by the Major Port)
Trusts (Amendment Act, 1974) having its)
Administrative Office at Shoorji)
Vallabhdas Marg, Fort, Mumbai 400 038)
- ~~2. Smt. Fatemabai Faizullabhai Raja)~~
- ~~3. Smt. Ashrafbhai Faizullabhai Raja)~~
2. Mrs. Zohra w/o. of Mohammedi F. Raja,)
3. Dr. Faizulla M. Raja)
4. Dr. Ashfaque M. Raja)
All of Auckland, residing at present)
at 488, MT Albert Road, Three Kings,)
Auckland, New Zealand) ... Respondents

Ms. Sharanya Shivaraman a/w Mr. Vishal Latange for the Petitioner
No. 1(d).

Mr. Dhruva Gandhi a/w Ms. Nina Motiwalla & Ms. Anjali Kotecha i/b
Motiwalla & Co. for Respondent No. 1.



CORAM : M.M. SATHAYE, J.
RESERVED ON : 22nd DECEMBER, 2025
PRONOUNCED ON : 8th MAY, 2026

JUDGMENT :

1. This petition is filed under Article 226 and 227 of Constitution of India, challenging judgment and order dated 27.02.2001 passed in Appeal No. 458 of 1998 with Cross Objection No. 6 of 1999 by the Appellate Bench of the Small Causes Court at Mumbai. The dispute arises out of mesne profits.

2. Few facts necessary for disposal of this petition, are as under.

2.1. A plot No. 322C admeasuring 154.82 Sq. Mtrs. of Respondent No. 1-Port Trust is the subject matter plot, hereinafter referred to as 'the suit-plot'.

2.2. Respondent No.1 filed L.E.&C. Suit No. 118/156 of 1978 for eviction of the Petitioners and arrears of rent of Petitioners in the Small Causes Court at Mumbai.

2.3. On 02.08.1989, the said suit was decreed after recording that possession of the suit-plot is already received by Respondent No. 1 and it was held that Respondent No. 1 was entitled to inquiry for future mesne profits.

2.4. On 25.04.1990, Respondent No. 1 took out Misc. Notice No. 480 of 1990 for mesne profits of the suit-plot. The case of the Respondent No. 1 in short, is as under. That Respondent No. 1 has obtained vacant possession of the suit-plot on 28.01.1987. That



mesne profits are claimed @ Rs.904.15 from June 1978 till January 1982, Rs.993.94 from February 1982 till January 1983 and Rs.3,818.49 from February 1983 till January 1987. That the said amounts are exclusive of service charges, municipal taxes and other charges payable by the Petitioners. That Petitioners are liable to pay till handing over of the possession.

2.5. The Petitioners filed reply contending *inter alia* that they have handed over the possession prior to 28.01.1987. That Respondent No. 1 has accepted compensation at the agreed rate. That since the Petitioners could not use the suit-plot because of the encroachment all around it, making it impossible to have access, in September 1982, the Petitioners decided to surrender the suit-plot and accordingly by a registered letter dated 15.09.1982 (Exh-K), informed Respondent No. 1 that the Petitioners are not interested in suit-plot and wish to surrender the suit-plot. That for the said purpose appointment was fixed by the end of 30.09.1982. That it was clarified in the letter that the Petitioners will not be liable to pay compensation from 01.10.1982, if Respondent No. 1 fails to take possession. That the said letter was received by Respondent No. 1. That on 30.09.1982, the Petitioners waited for the officer of Respondent No. 1 to come to suit-plot for taking formal possession. However, nobody turned up. That thereafter also attempts were made to deliver possession to Respondent No. 1, who failed to take it. That, therefore, surrender is deemed to have taken place on or about 01.10.1982 and therefore Petitioners are not liable to pay mesne profits thereafter. That during pendency of the suit also it was brought to the notice of the Court about offer made for handing over



possession and the Court directed Respondent No. 1 to take possession and accordingly Respondent No. 1 has taken actual physical possession of suit-plot on 28.01.1987. That the agreed rent itself was excessive. That unless Respondent No. 1 gives particulars of the basis on which they are claiming mesne profits, it cannot be accepted.

2.6. On 16/17.06.1998, the Small Causes Court at Mumbai decided the claim of mesne profits, thereby directing that Respondent No. 1 is entitled to recover Rs.23,142.51 from the Petitioners and other Respondents along with interest @ 10% p.a. till 31.08.1981 and @ 15% p. a. from 01.09.1981 till realization.

2.7. Respondent No.1 filed Appeal No. 458 of 1998 before the Appellate Bench of Small Causes Court at Mumbai challenging the above order. The Petitioners filed Cross-Objection No. 6 of 1999 contending that they were not liable to pay.

2.8. By impugned order dated 27.02.2001, the Appellate Court allowed the appeal of Respondent No.1, thereby setting aside the order of the Trial Court. It allowed entire claim of mesne profits and dismissed the cross-objection.

2.9. In this backdrop, the petition is filed, which is admitted on 08.08.2001 and subject to Petitioners depositing a sum of Rs. 2 lacs in this Court, the impugned order was stayed. It was directed that the party succeeding in the petition shall be entitled to receive the said amount which was directed to be invested.



SUBMISSIONS

3. Learned counsel for the Petitioners submitted that it is for the Respondent No. 1 to prove that Petitioners were in possession till 28.01.1987. That Petitioners had offered to surrender the possession and called upon the Respondent No. 1 to take possession, but Respondent No. 1 failed to act and therefore possession must be deemed to have been surrendered on or about 30.09.1982. That the Court considering mesne profits must conclude that the possession after 01.10.1982 was wrongful and only then mesne profits can be granted. That since there is no adjudication about wrongful possession, mesne profits can not be granted. That amounts of compensation claimed were challenged before the Trial Court and Appellate Court. She relied on following judgments in support of case of the Petitioners :

- i. Shambhu Nath Khettri and Ors. Vs. Satish Chandra Mitra 1920 SCC OnLine Cal 44.
- ii. Raja Sashikanta Acharyya Vs. Raja Sarat Chandra Rai Chaudhuri AIR 1921 Cal 699.
- iii. Chhagmull Agarwalla Vs. Amanatulla Mahammad Prophan 1924 SCC OnLine Cal 153.
- iv. Kumari Asha Parekh and Ors. Vs. Madhav Motors Stores Pvt. Ltd., Mumbai and Ors. 2021 SCC OnLine Bom 671.
- v. Marshall Sons and Co. (I) Ltd. Vs. Sahi Oretrans (P) Ltd. and Anr. (1999) 2 SCC 325.
- vi. Chittoori Subbanna Vs. Kudappa Subbanna and Ors. 1964 SCC OnLine SC 322.

4. On the other hand, learned counsel for Respondent No.1-Port Trust supported the impugned judgment and order contending *inter*



alia as under. That the Appellate Court has properly considered the aspect of mesne profits and its appeal has been rightly allowed and the cross objections have been rightly dismissed. That under the letter of the Petitioners dated 15.09.1982, the Petitioners had only expressed 'wish to surrender' the suit-plot and request to take possession was made; but this does not amount to actual surrender of the suit property. He further submitted that actual possession has been taken under order of the Trial Court on 28.01.1987, during pendency of the suit. Therefore, there cannot be deemed surrender as argued by the Petitioners. He submitted that from 1982 till 1987 nothing prevented the Petitioners to apply to the Court for surrender of the possession and therefore Petitioners cannot be given benefit of such conduct. He submitted that since the surrender / relinquishment of possession has not taken place with a notice to Respondent No.1 through the Court as per provisions of Order XX Rule 12(1)(c)(ii) of Civil Procedure Code, 1908 ('CPC' for short), it cannot be said that the Petitioners are not liable to pay from date of expressing desire or wish to surrender. He relied on following judgments in support of his case.

- i. Bhagwati Prasad Vs. Chandramaul 1965 SCC OnLine SC 111.
- ii. Golapdas Khettri Vs. Phulchand Purusottamdas 1946 ILR 411.
- iii. M/s. Basant & Co. Vs. M/s. Osram India Pvt. Ltd. 2018 SCC OnLine Del 7776.

REASONS AND CONCLUSION

5. I have carefully considered the submissions and perused the record.



6. Firstly, it is necessary to examine whether it can be said that there was surrender by the Petitioners by end of September 1982 so as to absolve them from liability to pay mesne profits thereafter, till actual possession was taken in January 1987. Having heard learned counsel for the parties and after going through the record and impugned order, my answer is 'No' for following reasons.

7. It is necessary to note following aspects emerging from the record :

(a) Letter dated 15.09.1982 (Exh-K) clearly indicates that it is written by the Petitioners to the Docks Manager of Respondent No. 1, informing that Petitioners are not interested in the suit-plot and they wish to surrender the same and a request was made to take possession w.e.f. 01.10.1982. A statement was made that liability for payment of rent will cease from 01.10.1982, if Respondent No. 1 fails to take possession. This letter is 'mere expression of wish' with request to take possession. This does not indicate that possession was actually physically handed over.

(b) Internal communication of Respondent No. 1 dated 16.09.1982 indicates that conditional no objection was given, provided that all arrears of compensation are paid, hutment dweller, if any, are evicted and peaceful and vacant possession is given. This letter does not indicate that there was any 'unconditional decision' by Respondent No. 1 to take possession.

(c) Record shows that on 21.09.1982, there was internal communication between the officers of Respondent No.1 about suit-



plot stating that it is lying vacant 'except for Watchman's hut' inside the suit-plot where watchman seems to be residing. It is not disputed that it was Petitioners' Watchman whose hut was present at the relevant time. Therefore, it cannot be said that at the relevant time possession was not on behalf of the Petitioners. It was Petitioners' watchman who had a hut in suit-plot even after 01.10.1982.

(d) Further internal communication dated 07.10.1982 indicates that since suit for eviction was pending and it was expressed that Respondent No. 1 will have to obtain decree on admission and after decree is obtained, it can be executed.

8. Admittedly, the eviction suit is of the year 1978 and when the Petitioners expressed wish to surrender the possession and it was communicated to Respondent No. 1 in September 1982, the suit was pending. The matter was sub-judice. Despite this, the Petitioners chose to only issue letter directly to Respondent No. 1. It is the case of the Petitioners that officer of Respondent No.1 did not turn up for taking possession as per time fixed. If that be so, nothing prevented the Petitioner to apply to the Court in pending suit and invite an order for relinquishing possession through the Court. The Petitioners have not done so and have chosen to continue their watchman to remain in suit-plot.

9. It is already explained above that the Respondent No. 1 through its internal communications had discussed pendency of the proceedings and conditional decision was taken to take possession subject to pending compensation and if it is vacant. However, they found the Petitioners' watchman's hut. Also the issue of compensation



was sub-judice.

10. It is not disputed that later on, the actual physical possession of the suit-plot has been taken on 28.01.1987 under the order of the Trial Court.

11. In such circumstances, in my considered view, it was necessary for the Petitioners to follow the route provided under law and surrender possession, which is not done. Therefore the possession can not be deemed to be surrendered by 30.09.1982 as argued by the Petitioners. As a necessary corollary, the Petitioners are liable to pay mesne profits till January 1987.

12. Now the next question is whether the charges demanded by Respondent No. 1 were contested before the lower Courts. It is the contention of learned counsel for the Petitioners that the charges demanded are exorbitant, especially the charges demanded from February 1983 to January 1987 @ Rs.3,918.44 per month as per Bill No. NTB-477. It is contented that there is no basis for increase of compensation to Rs.3918.44 per month from February, 1983 when the charges were Rs.993.94 per month till January 1983. On the other hand, it is the contention of learned counsel for Respondent No. 1 that there was no dispute raised about the same in the Courts below.

13. In this respect, mere perusal of later portion of paragraph Nos. 11 and 12 of the impugned order indicates that such contention was indeed raised. It is also seen that contention was raised by Petitioners about sanction of Central Government and counter argument was



made by Respondent No. 1 that the resolution of the Bombay Port Trust is only required to be communicated to the Central Government and no sanction is required. In fact, the learned Appellate Bench of the Small Causes Court, has made a reference to 'Kirloskar formula' under which the rent is increased and a reported judgment of this Court i.e. AIR 2001 Bom 26 is also referred. The Appellate Bench has considered paragraph Nos.92 and 93 of said judgment and it is clearly held that once duty is cast upon the Bombay Port Trust, the compensation claimed by Respondent No. 1 at increased rate, the figure is required to be worked out and the Respondent No. 1 has to give credit if the amount comes less than claimed. Despite holding so, the Appellate Bench of the Small Causes Court, while passing the order (allowing Appeal of Respondent No. 1 and dismissing cross objection of Petitioners) did not direct anything about the figure and giving credit if the amount works out to be less than claimed. To that extent the impugned order requires interference.

14. In the aforesaid facts and circumstances, even though in principle it is held that there cannot be deemed surrender by end of September 1982 and mesne profits are payable till end of January 1987, the Respondent No. 1 is required to work-out the amount charged from February 1983 till January 1987 as held in impugned order itself (as per reported judgment of AIR 2001 Bom 26) and give credit to the Petitioners if the amount works out lesser than claimed.

15. Lastly, let us consider various judgments relied upon by learned counsel for the Petitioners.

15.1. In **Shambhu Nath Khetri (supra)**, Division Bench of Calcutta



High Court was dealing with similar issue where the Defendants had offered to deliver possession, but the plaintiff did not take it. In the said judgment, one of the reasons for disallowing mesne profits was that a stand was not taken by Plaintiff / decree-holder that relinquishment will not be accepted unless sent through Court. But there was also another reason for disallowing mesne profits, which was that no coal was extracted during relevant period. In the present case at hand, clear stand is taken that unless notice of relinquishment is through the Court, it cannot be taken as valid surrender. Also, in the present case, since the suit was pending and decree was not passed, no fault can be found with the stand of Respondent No. 1 about getting possession through the process of the Court. Admittedly, the Petitioners did not move the Court after the offer of surrender was not responded. Therefore, the said judgment will not advance the case of the petitioner in the peculiar facts of this case.

15.2. The judgment of **Raja Sashikanta Acharyya (supra)** is a pre-independence judgment. The learned counsel for the Petitioners fairly submitted that the facts are different and therefore it need not be considered.

15.3. The case of **Chhagmull Agarwalla (supra)** is once again a pre-independence judgment where ‘darchukani tenancy’ was under consideration and it was observed that wrongful possession is the essence of claim for mesne profits and the Defendant cannot be made responsible to pay mesne profits when he is not active in keeping plaintiff out of possession and damages can only be recovered for the time possession was actually retained. In the present case at hand, it



is already found that though an offer of surrender was made by Petitioners, they chose to continue its watchman's hut in the suit-plot and the order of the Court was not invited in the pending suit. Therefore it can be safely said that Petitioners were active in keeping Respondent No. 1 out of possession. Therefore this judgment will not help the petitioners in principle.

15.4. In **Kumari Asha Parekh and others (supra)** there were obstructionists involved and in that context the aspect of mesne profits were considered. The facts of the present case are completely different and therefore, this judgment will not help the Petitioners.

15.5. In **Marshall Sons and Co. (supra)**, the Hon'ble Supreme Court has observed that because of the delay, unscrupulous parties to the proceedings take undue advantage and the person who is in wrongful possession draws delight in delay in disposal of cases. In the said judgment, the Hon'ble Supreme Court has held that the High Court erred in upholding low rate of payment for mesne profits and directed the party claiming tenancy rights to pay mesne profits at revised rates. Apparently this judgment is not at all applicable in the facts of the present case and therefore further consideration is not necessary.

15.6. The case of **Chittoori Subbanna (supra)** is relied upon in support of the submission that the Petitioners can raise arguments about the quantum of charges demanded and there cannot be waiver of such right. However, as can be seen from paragraph 17 of the said judgment, the main point involved in the said judgment was whether mesne profits could be awarded for a period subsequent to expiry of



3 years from the date of decree. Such issue about period subsequent to decree is not involved in the present case. Also, the contention about compensation claimed is already being considered by this Court. Hence it is not necessary to consider the said judgment any further.

16. The petition is therefore disposed of by confirming the impugned judgment and order; however, Respondent no. 1 is directed to work-out the compensation claimed from February 1983 to January 1987 (as held at the end of paragraph 12 of the impugned order) and give credit to the Petitioners if the amount works out to be lesser than the claimed amount.

17. The parties shall be at liberty to apply for withdrawal of 'amount of Rs.2 lakh deposited in this Court (as per order dated 08.08.2001) along with interest accrued' or part thereof, after the amount of compensation is worked out as directed in paragraph 16 above.

18. The petition is disposed of with the aforesaid directions. No order as to costs.

19. At the request of learned counsel for the Petitioners, the operation of this order is stayed for a period of 4 weeks.

20. All concerned to act on duly authenticated or digitally signed copy of this order .

(M.M. SATHAYE, J.)