

Bombay High Court

\* The Osmanabad Janata Sahakari vs Pandharinath Gyanba Gunale on 1 August, 2014

Bench: T.V. Nalawade

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

First Appeal No.1214 of 2003

\* The Osmanabad Janata Sahakari  
Bank Ltd., having its Head office  
at Osmanabad, 24/114, Main Road,

Osmanabad,  
Through its Managing Director.

.. Appellant.

Versus

1) Pandharinath Gyanba Gunale,

Since deceased through his  
legal representatives :

1/A) Chandresena w/o Pandharinath Gunale,  
Age 60 years,  
Occupation : Household.

1/B) Aashish s/o Pandharinath Gunale,

Age Major,  
Occupation : Agriculture

1/C) Anuja w/o Santosh Reddy,  
Age Major,  
Occupation : Household

All R/o Ahmedpur,  
Taluka Ahmedpur,  
District Latur.

2) The Liquidator,

Latur Janata Krishi Audyogik  
Sewa Sahakari Society Ltd.,  
Head Office, Latur,  
District Latur,  
C/o District Deputy Registrar,  
Cooperative Societies, Latur. .. Respondents.

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Shri. V.D. Hon, Advocate, for appellant.

Shri. P.M. Shah, Senior Advocate, instructed by Shri. V.D.  
Gunale, Advocate, for respondent Nos.1A to 1C.

Shri. V.G. Shelke, Assistant Government Pleader, for  
respondent No.2.

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CORAM: T.V. NALAWADE, J.

Judgment reserved on : 23rd July 2014.

Judgment delivered on : 1st August 2014.

JUDGMENT :

1) The appeal is filed against the judgment and decree of Special Civil Suit No.8/2001 (Old Special Civil Suit No.232/1995) which was pending in the Court of the Civil Judge, Senior Division, Ahmedpur, District Latur.

The suit filed by the present respondent No.1 for relief of possession of immovable property and mense profit is decided in his favour. Counter claim filed by the appellant, defendant No.1, for specific performance of contract of sale of the same immovable property is dismissed by the trial Court. Both the sides are heard.

2) Municipal House No.9 situated at Ahmedpur having construction of godown of size of 50 x 40 ft and 3 FA 1214 of 2003 construction of three rooms and also open space surrounding the constriction is the suit property. The size of the plot on which the construction is there is around 8680 square feet (155 x 56 ft). It is the case of the plaintiff-respondent, that the defendant No.1 is in possession of the entire property. It is the case of the plaintiff that he purchased the suit property in auction sale held by the Liquidator of Osmanabad Zilla Audyogik Sewa Sahakari Society Ltd., and the sale deed was executed in his favour on 18-1-1990. He purchased the property for consideration of Rs.3.25 lakhs.

3) It is the case of the plaintiff that the appellant-

defendant, got the possession of the suit property under a document of lease dated 14-10-1982 from the previous owner. It is contended that agreement was for the period of ten years. It is contended that the owner society went into liquidation and the Liquidator came to be appointed on 27-9-1984. It is contended that there was public auction held by the Liquidator after following the procedure and the plaintiff was highest bidder in the said auction. It is the case of the plaintiff that sale made in his 4 FA 1214 of 2003 favour was approved by the Government of Maharashtra on 8-12-1989 and after that the sale deed was executed.

4) It is the case of the plaintiff that the defendant had challenged the legality of the auction by filing proceeding before the authority constituted under the Maharashtra Cooperative Societies Act but it failed in that attempt. It is contended that proceeding filed by the defendant No.1 as against the

order made by the authority came to be dismissed in High Court on 25-5-1992. It is contended that Writ Petition No.2779/1993 was also filed by the defendant No.1 but it also came to be dismissed. It is contended that while dismissing the writ petition filed by the defendant No.1, the High Court observed that the plaintiff needs to follow the procedure laid down by law for taking possession as the defendant No.1 was in possession as lessee and so he filed the present suit.

5) It is the case of the plaintiff that he was not aware of the agreement of lease dated 14-10-1982 which was between defendant No.1 and the previous owner. He contended that he is bona fide purchaser without notice for valuable consideration and so the transaction between 5 FA 1214 of 2003 the defendant No.1 and the previous owner is not binding on him. It is contended that, previous owner had told that after the sale deed the plaintiff would get possession.

6) It is the case of the plaintiff that the Liquidator asked the defendant No.1 to hand over possession to the plaintiff by sending letter but the defendant No.1 did not hand over the possession. It is contended that the defendant No.1 challenged the legality of the auction sale and he also disputed the title of the plaintiff over the suit property. It is the case of the plaintiff that due to such contentions of the defendant No.1 and the aforesaid circumstances, he is not entitled to keep the possession of the property as tenant.

7) It is the case of the plaintiff that under the agreement between the defendant No.1 and the previous owner some period was fixed in respect of lease and after expiry of the period, the defendant No.1 did not exercise option to continue the possession as lessee. It is contended that due to this reason also the defendant is liable to be evicted.

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8) It is the case of the plaintiff that after the

disposal of the writ petition on 30-11-1994 cause of action arose for filing the suit. It is contended that possession of the defendant No.1 is illegal. It is contended that as per the rent prevailing in the market in respect of similar premises, the the suit premises can be given on rent for Rs.30,000/- per year. It is contended that, the premises is situated in commercial area and the plaintiff is entitled to get mense profit for the period starting from 15-10-1992, the date on which the period of lease of 10 years expired.

It is the case of the plaintiff that he is entitled to the relief of mense profit of Rs.5,72,880/- per annum considering the size of the property. He had claimed the mense profit of Rs.20,43,640/- in respect of the period of three years preceding the date of the suit.

9) The defendant No.1 filed written statement. It is the case of the defendant No.1 that the Liquidator had given the offer to the defendant No.1 to purchase the property as per the price fixed

by the Public Works Division. It is contended that to the letter of offer given on 3-1-1987 response was given by the defendant No.1 on 23-

7 FA 1214 of 2003 1-1987 and the defendant No.1 had accepted the offer. It is contended the PWD determined the value of the property as Rs.3,21,000/- and the defendant No.1 was ready to purchase it for such price. It is contended that the defendant No.1 is ready and willing to purchase the property at such price.

10) It is the case of the defendant No.1 that the plaintiff in collusion with the Liquidator created false record of public auction for sale of the suit property and purchased the property in the said auction. It is contended that in view of the aforesaid agreement, sale made in favour of the plaintiff is not binding on the defendant No.1. It is contended that after learning about the intention to sell the property in public auction, the defendant No.1 had given public notice and had informed about its rights.

11) It is the case of the defendant No.1 that it is in possession of the suit property under agreement of lease since 14-12-1982. It is contended that initial lease period was of 10 years and after that defendant had right to continue possession as lessee for further period of five 8 FA 1214 of 2003 years. It is contended that, rent fixed by the PWD initially for the year 1982 was Rs.555/- per month. It is contended that as per the agreement, the defendant is entitled to continue the possession as lessee till 16-12-1997. It is contended that there was no cause of action as the suit was filed prior to 16-12-1997.

12) It is the case of the defendant that the Liquidator had no right to give notice to the defendant and to ask to deliver the possession. The defendant has denied that its possession is like of a trespasser. It has denied cause of action for filing the suit arose after dismissal of the writ petition. It has denied that it is liable to pay mense profit of Rs.20,43,640/-.

13) It is the case of the defendant that in view of Section 164 of the Maharashtra Cooperative Societies Act, 1960, (in short, "said Act") notice needs to be given to it as it is a cooperative society and as no such notice was issued the suit itself is not tenable.

14) The defendant No.1 filed counter claim and it

contended that it is entitled to relief of specific

performance of the aforesaid agreement of sale made by the Liquidator with the defendant. It is the case of the defendant that the defendant continued possession under the agreement of sale. It is contended that the sale in favour of the plaintiff made by the liquidator is not binding on the defendant. The defendant prayed for the relief of declaration that the sale made in favour of the plaintiff is not binding on it.

15) The plaintiff filed written statement to the aforesaid counter claim and the plaintiff denied the contentions made in the counter claim. The plaintiff contended that in view of the decision of the High Court in Writ Petition No.2779/1997 the defendant cannot contend that it is entitled to purchase the property and the decision of the writ petition operates as res judicata against the defendant.

16) It is the case of the plaintiff that in spite of knowledge of auction sale proceeding, the defendant did 10 FA 1214 of 2003 not participate in the auction proceeding. It is contended that, as per the provisions of the said Act, sale made by auction has become final. It is the case of the plaintiff that there was no valid agreement between the defendant and the Liquidator as no approval was obtained from the authority created under section 105(1)(c) of the said Act and also Rule 89 of the Rules framed under the said Act.

17) It is the case of the plaintiff that the Liquidator had asked the defendant to vacate the premises by letter dated 1-7-1987 and this letter is sufficient to show that the contract was rescinded. It is contended that auction was held on working day when the defendant No.1-bank was running its business but the bank did not participate in the auction.

18) In view of the aforesaid pleadings as many as 21 issues were framed by the trial Court. Both the sides gave evidence. In answer to issue No.2, the Trial Court held that possession of the defendant is illegal since 15-

10-1992 i.e. on expiry of period of 10 years given in the document of lease. But in the reasoning, the trial Court has mentioned at a place that possession became unlawful 11 FA 1214 of 2003 on 13-12-1997 i.e. the date on which the period of 15 years expired. The trial Court has granted mense profit for the period starting from 15-10-1992. The trial Court has held that the plaintiff is entitled to get possession and the suit was tenable on the date when it was filed. The trial Court has also held that the defendant has no right to purchase the suit property and it failed to prove that there was enforceable agreement between it and the previous owner of the property. The trial Court has held that the defendant is not entitled to protection of possession under section 53-A of the Transfer of Property Act.

19) The document of lease which was executed by the previous owner in favour of the defendant is exhibited at Exhibit 51/A by the trial Court. This document was written on general stamp of Rs.5/- denomination and it was not registered. It was executed on 14-12-1982. The initial period fixed was 10 years and after the expiry of it, option was given to the lessee to get renewal of the lease for further period of five years. Rent was to be determined by the PWD, Government department. Thus the lease was 12 FA 1214 of 2003 for period exceeding one year. Rent was fixed at Rs.555/-

per month but no stamp duty was paid on the document of lease.

20) The point of entitlement of the defendant to keep possession under the aforesaid document is the main point involved in the matter. This point needs to be considered first. This point is relevant for determination of many points. The point of requirement of notice under section 106 of the Transfer of Property Act, the point of expiry of term of period fixed in the document (the application of Sections 107, 111(a) of the Transfer of Property Act), the application of provisions of section 111(g) of the Act regarding forfeiture of tenancy, point of starting point of period of unlawful possession for determination of mense profit etc., all these points depend on this point.

21) The definition of "lease" is given in section 105 of the Transfer of Property Act, 1882 (for short, "T.P. Act").

The definition says that lease is transfer of interest, transfer of right to enjoy the immovable property and it 13 FA 1214 of 2003 can be for limited period or it can be in perpetuity. In view of the rights and liabilities of lessor and lessee, it is a bilateral transaction. As the relationship of lessor and lessee is created by the bilateral transaction, rate of rent, the duration of lease and other terms of lease are all governed by the terms of the contract.

22) Section 106(1) of the T.P. Act reads as under :-

"106. Duration of certain leases in absence of written contract or local usage.-- (1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice."

Wording of the aforesaid section shows that if there is no specific contract about the duration of lease for property like present one, the lease shall be deemed to be a lease from month to month. The term "contract" used in section 106(1) is necessarily an agreement enforceable under the 14 FA 1214 of 2003 Contract Act. In section 4 of the T.P. Act it is made clear that the provisions of the Contract Act 1872 are applicable whenever any section of the T.P. Act relates to contract.

Section 4 further shows that for the purpose of Section 107 of the T.P. Act provisions of Indian Registration Act 1908 are applicable. There is similar mention in Section 49 of the Indian Registration Act. In section 17 of the Indian Registration Act there is also reference to the lease which is compulsorily registrable.

23) Section 107 of the T.P. act gives mode, procedure for making the lease which reads as under :-

"107. Leases how made.-- A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee :

15 FA 1214 of 2003 Provided that the State Government may from time to time, by notification in the Official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession."

This section says that if period of lease is exceeding one year, lease can be made only by a registered instrument.

The aforesaid provision shows that if the lease is for period less than one year, it can be made even by oral agreement accompanied by delivery of possession.

24) In the case reported as AIR 1968 SC 794 (Delhi Motor Co. v. V.A. Basrurkar) the Apex Court has discussed the provisions of Sections 106 and 107 of the T.P. Act. The Apex Court has laid down that when the lease period exceeds one year and it is not registered, the transaction itself is invalid and if the transaction is invalid, both sides to such transaction cannot claim the enforcement of the terms of such transaction. Learned Senior Counsel for the respondent placed reliance on case reported as (2011) 14 SCC 66 (SMS Tea Estates (P) Ltd. v. Chandmari Tea 16 FA 1214 of 2003 Co. (P) Ltd). In this case the Apex Court has reiterated that such unregistered agreement is not enforceable.

Thus, the agreement contained in such unregistered document, is not excepted under section 106 of the T.P.

Act. The term "contract to contrary" used in the starting line of section 106 of the T.P. Act, cannot be used with reference to such unregistered instrument. However, the aforesaid provisions show that even oral lease is possible and so the party can plead that there was agreement of lease and the lessee came in possession under such agreement.

25) Section 49 of the Registration Act, 1908 (for short, "the Registration Act") also comes in way of the parties to the transaction like the present one. Section 49(a) and (c) and the proviso read as under :-

"49. Effect of non-registration of documents required to be registered .-- No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall --

(a) affect any immovable property comprised therein, or



(b) .....

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(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered :

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877), or as evidence of part performance of a contract for the purposes of section 53A of the Transfer of Property Act, 1882, (before amendment of year 2001) or as evidence of any collateral transaction not required to be effected by registered instrument."

26) Clause (a) of Section 49 of the Registration Act shows that when transaction which is required to be registered is not registered, such transaction does not affect the property. Thus, no powers or rights are conferred by the document on the parties to such transaction. In view of Section 107 of the T.P. Act and Section 49 of the Registration Act, such transaction needs to be treated as void. As it is void agreement, it does not create title or interest which cannot be transferred without registration. Section 49(c) of the Registration Act, creates further bar by saying that, such document cannot 18 FA 1214 of 2003 be read in evidence to create, declare or limit the rights of the parties to such document.

27) The proviso to Section 49 of the Registration Act shows that such unregistered document can be used for getting specific performance of contract which is possible under Chapter II of the Specific Registration Act.

It also shows that the document can also be used for the purpose of Section 53-A of the T.P. Act, as amendment deleting this portion was made in the year 2001. The proviso further shows that the document can be used for collateral purpose in evidence.

28) So far as right to get specific performance as mentioned in the proviso is concerned, it can be said that the present transaction of lease does not fall under Chapter II of the Specific Relief Act. By the present transaction, the demise in the property was created and under section 107 of the T.P. Act it was compulsory to register the document. In view of provision of Section 107 of the T.P. Act the transaction itself was invalid. So, in the present case there was no question of specific 19 FA 1214 of 2003 performance of contract under Chapter II of the Specific Relief Act. In any case, no such relief was claimed by the defendant under the aforesaid document.

29) The defendant has claimed protection of possession by using Section 53-A of the T.P. Act. The aforesaid provision of Section 49 of the Registration Act and the provision of Section 53-A of the T.P. Act need to be read together. Section 53-A of the T.P. Act reads as under :-

"53-A. Part performance.-- Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof"

Fourth part of Section 53-A shows that this section is applicable not only to enforceable agreement but also to instruments of transfer where transfer has not been completed in the manner prescribed therefor by law for the time being in force. In the present case transaction mentioned in the instrument is invalid in view of Section 107 of the T.P. Act and so there was no question of transfer of any interest under the document to the defendant. In strict sense it can be said that unregistered document cannot be used to show that the rights, which could not have been transferred under the document, like the lease for a period of ten years, were transferred and for that matter the person who got possession, cannot be treated as transferee under this provision.

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30) In the case reported as AIR 1984 SC 143

(Satish Chand v. Govardhan Das) and in the case of SMS Tea Estates (cited supra), the Apex Court has discussed the purpose for which such unregistered lease document can be used. It is laid down that to ascertain nature of possession, whether it is lawful, whether it is of lessee, the document can be used. However, the terms and conditions of the lease which are not enforceable in view of the provisions of section 107 of the T.P. Act cannot be read in evidence. Thus, for collateral purpose, to ascertain nature of possession, the possession as lessee, this document can be read in evidence. Only to that extent the protection is available under section 53-A of the T.P. Act. The lessee cannot be allowed to say that he is entitled to keep possession for the period mentioned in the unregistered document as that will amount to enforcing the terms of transaction which is not permissible under section 107 of the T.P. Act and under Section 49 of the Registration Act.

The lease for period of less than one year can be made orally or by instrument and so the document can be read only to ascertain nature of possession.

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31) The discussion made above shows that when

under unregistered document, like in the present case, lessee gets possession and lessor accepts the rent after the execution of the document, the document can be used in evidence for the aforesaid limited purpose, for ascertaining the relationship between the parties to the document. As the period mentioned in the document cannot be read, the lessee becomes month to month tenant as provided under section 106 of the T.P. Act. In such a case the provisions with regard to the lease of fixed period cannot be used, like the provision of Section 111(a).

32) For the appellant, learned counsel has placed reliance on a reported case AIR 1950 SC 1 (Maneklal v.

H.J. Ginwalla & Sons). In this case, the Apex Court has discussed the provision of Section 53-A of the T.P. Act. The Apex Court had observed that the tenant can retain the possession by using Section 53-A of the T.P. Act. The provision of section 49 of the Registration Act was also considered by the Apex Court. The facts of the reported case were, however, little bit different. This Court has 23 FA 1214 of 2003 quoted the subsequently decided cases of the Hon'ble Apex Court on the same point which need to be used as the precedent in the present case. Further, the readiness and willingness of a lessee to perform the part of the contract also needs to be considered for getting benefit of provision of section 53-A of the T.P. Act. On this point also the defendant has failed in the present case.

33) The oral and documentary evidence given in the case show that from the year 1987 itself the defendant stopped paying the rent. He was asked to pay rent even after sale of the property to the plaintiff by the original owner but the defendant failed to pay rent to the plaintiff.

Though the covenant like that the lease runs with immovable property, and section 53-A can be used against the purchaser also, it was necessary for the defendant to pay or tender the rent to the lessor and then to the plaintiff regularly as it was month to month tenant. The defendant disputed the title of the plaintiff and it claimed that it was in possession under agreement of sale with the previous owner. The defendant could not prove that there was such agreement between it and the previous owner 24 FA 1214 of 2003 but in spite of that it did not pay the rent. In view of these circumstances, this Court holds that the defendant failed to prove that it was ready and willing to perform its part of the contract, to pay rent regularly. So the defendant is not entitled to the protection under section 53-A also.

34) It is already observed that in the case like the present one, provision of Section 106 of the T.P. Act needs to be used. There is the record like notices issued by the previous owner, lessor, to the defendant asking it to vacate the premises and the tenancy was terminated.

Even written information was given by the previous owner that the property was purchased by the present plaintiff.

Various notices were given for asking to vacate the premises and they were given on 3-1-1987, 17-2-1987, 27-

11-1987. After many months of expiry of the prescribed period (under section 106 of T.P. Act) the suit was filed for possession. On the requirement of statutory notice provided under section 106 of the T.P. Act, learned Senior Counsel for the plaintiff has placed reliance on a case reported as 2006 (4) Mh.L.J. 154 (Bombay High Court) (Division Bench) (Allahabad Bank v. Prakash Shankar 25 FA 1214 of 2003 Wagh). This Court has considered the amended provision of Section 106 of the T.P. Act and this Court has held that the amended provision is applicable to the pending proceeding also. In view of the amendment and the effect which needs to be given to the amendment, this Court has laid down that after expiry of 15 days period from the date of receipt of the notice, the suit can be filed and in that case the Courts need to hold that it was sufficient and valid notice. The ratio of this reported case needs to be applied in the present case. Thus even if it is presumed that the defendant was lessee and the lease was month to month basis, there was termination of lease by notice as required under section 106 of the T.P. Act.

35) The defence of the defendant that it has right to purchase the suit property and there was agreement between it and the Liquidator, can be used against the defendant. On one hand the defendant wanted protection of Section 53-A of the T.P. Act under unregistered lease and on the other hand, it claimed the relief of specific performance of agreement of sale. The question arises as to whether the defendant can take a defence in such a 26 FA 1214 of 2003 case that there was no notice of termination of tenancy.

36) The learned Senior Counsel for the respondent placed reliance on one more case reported as (1989) 4 SCC 732 (Majati Subbarao v. P.V.K. Krishna Rao) . The proceeding was filed under the provision of A.P. Buildings (Lease, Rent and Eviction) Control Act, 1960, and in the said proceeding, in view of the provisions of the said Act, the Apex Court held that the suit was maintainable on the ground of denial of title of landlord by the tenant. In that case the Apex Court laid down that no forfeiture of the rights was necessary in such a case. Similar observations are made by the Apex Court in a decision delivered in Civil Appeal No.106/2014 (Kesharbai v. Chhunulal) . This Court has gone through the provision of Section 111 of the T.P. Act. The procedure is different and it shows that termination of lease is possible by forfeiture provided that the lessor gives notice in writing to the lessee of his intention to terminate the lease on such ground. In view of this specific provision in the T.P. Act, this Court holds that the observations made by the Hon'ble Apex court in the aforesaid two cases are of no help to the plaintiff.

27 FA 1214 of 2003 Admittedly, there was no such forfeiture in the present case (as provided in section 111(g) of the T.P. Act). There was only notice of termination of the lease as provided under section 106 of the T.P. Act and it can be said that the lease came to an end after the expiration of this notice period as provided under section 111(h) of the T.P. Act.

37) The various notices given by the Liquidator to the defendant which can be found in the documents dated 1-7-1987, 18-7-1987, 13-12-1987 and 7-2-1990 show that the defendant was asked to pay arrears of rent.

Admittedly PWD had fixed monthly rent at Rs.555/- for the year 1982. On that basis the arrears were calculated and mentioned in letter dated 13-12-1987 and they were of Rs.3,577.50 paise. The defendant was asked to hand over the possession and also to pay arrears. It is not the case of the defendant that after the notice dated 13-12-1987 it paid arrears of Rs.3577.50. It was to pay rent for further period also starting from 31-12-1987 and admittedly that rent was also not paid. It can be said that as per the procedure, the PWD would have again made assessment and would have again fixed the rent in subsequent years.

28 FA 1214 of 2003 But there is no such record produced by the plaintiff or by the defendant. The witness Vasant, DW 1, examined by the defendant has not given evidence that rent was paid subsequent to 13-12-1987. Thus there was virtually no case to defend.

38) The other case of the defendant that there was agreement of sale between it and the Liquidator is tried to be proved in the evidence of Vasant and by producing some correspondence between the Liquidator and the defendant Bank. At Exhibit 116 there is a letter dated 3-1-

1987 in which the Liquidator had asked the defendant Bank as to whether it was ready to purchase the suit property at the price which may be fixed by the PWD. In letters dated 17-2-1987 and 27-11-1987 the defendant-

bank expressed that it was ready to purchase the property. Then there is correspondence made with Deputy Registrar, Cooperative Societies. The correspondence shows that the Deputy Registrar had not given approval for this transaction and on the contrary direction was given by the Deputy Registrar in January 1987 to sell the property by public auction (Exhibit 130). After publication 29 FA 1214 of 2003 of the notice of public auction by the Liquidator the defendant took some steps like taking objections to the sale to the third party and published its objections in news papers. This step cannot be called as the proper step, if the defendant-bank wanted to get specific performance of the so called agreement of sale. If the defendant-bank was really interested in purchasing the property it would have participated in auction sale which was held at its door step. On 8-5-1985 auction sale was held and the plaintiff was the highest bidder. The plaintiff purchased the property for a consideration of Rs.3.25 lakh. Sale was conducted as per the Rules 1961 made under the said Act.

Section 105(1)(c) of the said Act read with rule 89(14)(i) of the Rules, 1961 show that sale of property of cooperative society can be done only after approval of the Registrar. In the rules, there are provisions for sale and attachment like rules 107 and 156. Rule 107(13)(i) shows that stages are

provided for taking objections to the proposed sale and the persons like the present defendant can raise objections. Rule 107(19)(c) shows that such objector can file suit to establish the interest, the rights in the property and subject to the decision of the suit the 30 FA 1214 of 2003 order made under the rules by the authority shall be final. It can be said that if there was some right with the defendant in the property, it was open to it to go to Civil Court and establish its rights. However, the aforesaid record and circumstances show that there was no approval to the so called proposal given by the Liquidator and no enforceable agreement had come to in existence.

In any case when the property is belonging to a society it is always desirable that the property is sold by public auction and not by private negotiations. Highest price of Rs.3.25 lakh was received as against the price of Rs.3.21 lakh fixed for sale. Thus, there is no case with the defendant on this point also and the trial Court has not committed any error in refusing the relief of specific performance to the defendant. In support of the case of the defendant that it is entitled to get relief of specific performance learned counsel for appellant placed reliance on one case reported as AIR 1963 SC 1685 (Union of India v. Rallia Ram) . The facts of this reported case were altogether different. This Court holds that this reported case has no application to the facts of the present case.

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39) One of the points argued by the learned

counsel for the appellant-defendant is that, the defendant itself is a cooperative society and so notice under Section 164 of the Maharashtra Cooperative Societies Act was necessary before filing suit against it. Learned counsel for the defendant placed reliance on a case reported as 2002(3) Mh.L.J. 837 (Bombay High Court) (Suprabhat Co-

operative Housing Society Ltd. v. Span Builders) . In view of the facts of that case, considering the business of the society, the Court had held that notice under section 164 was necessary. Considering the business of the present defendant and the transaction which was made with the previous owner, the ratio of the reported case has no application to the present case. On the other hand, learned Senior Counsel for plaintiff placed reliance on a case reported as 2005 (1) Mh.L.J. 24 (Bombay High Court) (Solapur Taluka Khadi Gramodyog Utpadak Sahakari Society v. Dattatraya Shankarrao Kondekar) . This Court has laid down that if the transaction is not touching the business of the society, no notice under section 164 of the said Act is necessary. No such notice was necessary in this case.

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40) For ascertaining the mense profit, the date of

wrongful possession needs to be ascertained first. In this regard provision of Order 2 Rule 12 and Order 20 Rule 12 of the Code of Civil Procedure need to be kept in mind.

The provisions show that the Court is expected to ascertain the profit, the person in wrongful possession actually received or would have received for determining the mense profit and the Court can give even interest on such amount. However, the profits due to improvements made by the persons in wrongful possession cannot be considered while ascertaining the damages. When there is claim for damages, no rigid rule for determining the amount of mense profit is there and the amount needs to be ascertained in every case by proper exercise of jurisdiction. The Court can take into account the prevailing rent, the probable increase etc. Mense profit includes the profit of the property and interest on such profit. The interest can be payable from the date of preliminary decree as it depends upon determining of point of unlawful possession. The mense profit need to be calculated on the prevailing rent and not on the agreed rent as it is to be calculated in respect of the period for 33 FA 1214 of 2003 which the party was in unlawful possession. The provision shows that decree can be given for possession and also for past mense profit and interest on it and inquiry can be directed for ascertaining mense profit in respect of the period starting from the date of the suit. The first part of the decree can be treated as final decree. When the defendant has been in possession for long period then it is the duty of the Court to decide the mense profit and it can be done even for period upto the date of decree. In the present case past mense profit is awarded by the trial Court and enquiry is directed in respect of future period.

41) The plaintiff has examined witnesses to prove the damages, the prevailing rent. It is contended in the plaint that he is entitled to Rs.5,72,880/- as damages as annual rent. The suit was filed on 21-11-1995 and the mense profit was claimed for the period starting from 15-

10-1992. In view of the discussion already made and the finding given that the possession became unlawful after expiry of period given in the notice of possession, the plaintiff was entitled to claim mense profit for period starting from 15-12-1992. The only question is about rate 34 FA 1214 of 2003 at which the amount can be given.

42) It is admitted that the suit property is situated near main road of Ahmedpur town and it is commercial area. It is the case of plaintiff that a shop admeasuring 15 x 30 ft. fetches rent of Rs.30,000/- per year. The suit premises includes a godown of 50 x 40 ft three rooms and open space. The size of the plot with construction is around 8680 square feet. The evidence given by the plaintiff is consistent with this pleading.

43) Two witnesses like Sharad and Bhutada are examined by the plaintiff to prove the prevailing rent in that locality. Sharad is owner of one shop having size 15 x 30 and in that premise one person runs a grocery shop. In the year 1997 the annual rent was Rs.35,000/-. Rent receipt is proved. But the assessment list is not produced to show that said rent is shown by municipality and tax is charged on the basis of such assessment. The grocery shop is situated on the road. The suit premises is situated at some distance from the road. The trial Court has granted mense profit as claimed by

the plaintiff, Rs.5,72,880/- per annum.

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44)            Though there is nothing in rebuttal from the

side of the defendant, it was necessary for the plaintiff to prove that the property of witness Sharad is comparable to the suit property. The evidence on the record shows that the godown was given on lease and the defendant bank was required to spend to make it suitable for bank business. Though the area of the suit premises is much bigger than the area of shop premises of Sharad, there are aforesaid circumstances and there are provisions of the CPC which are already quoted. In view of the facts and circumstances of the case, it is not possible to determine the mense profit on the basis of evidence given by Sharad or Bhutada or the claim made by the plaintiff. As the amount needs to be fixed and there are no particulars available, this Court holds that some method needs to be evolved. The suit property was purchased for consideration of Rs.3.25 lakh in the year 1989. We have to ascertain the price in the year 1992 the year from which the mense profit is claimed. By giving increase of 10% in the price it can be said that in the year 1992 the price of the suit property was around Rs.4.35 lakhs. It can be presumed that the suit property would have fetched the 36 FA 1214 of 2003 rent of at least 10% of the price. In the year 1992 the rent per year would have been Rs.43,000/-. Accordingly the rent for further period can be calculated and the rent would be around Rs.1.42 lakh. As per the contract, the PWD had fixed monthly rent of Rs.555/- in the year 1982.

If in similar manner the rent is calculated, it would be around Rs.21,000/- per annum. As damages cannot be fixed at contracted rate, and if the prevailing rent is highest, the prevailing market rent needs to be given, this Court holds that in the year 1992 the profit of Rs.43,000/-

per annum would have been made by the defendant-bank and this would have increased at least by 10% in subsequent years till the date of the suit. This Court holds that the amount of Rs.1.42 lakh can be given as mense profit for the period ending on the date of the suit. The trial Court has granted huge amount, amount of Rs.17,18,640/- as mense profit and it is certainly on higher side. In view of the facts and circumstances of the case which are already discussed, this Court holds that correction is required in that part of the decision.

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45)            In the result, the appeal is partly allowed. The



judgment and decree of the trial Court is modified only in respect of past mense profit. The defendant is directed to pay past mense profit of Rs.1.42 lakh (one lakh forty two thousand). This finding will not be binding for ascertaining future mense profit which is to be done as per the enquiry ordered by the trial Court. The interest at the rate of 8.5% per annum is available on the amount of Rs.1.42 lakh from the date of decree of trial Court till the date of realization of the amount. The other part of the decision of the trial Court is kept in tact. Decree is to be prepared accordingly.

46) Learned counsel for the appellant requested for stay of six weeks. In view of the observations which are made by this Court and considering right of the appellant, defendant, to challenge the decision, time of five weeks is given after hearing the other side for challenging the decision. Till then the judgment and decree of eviction is not to be executed but subject to condition that the defendant needs to deposit Rs. One lakh in this Court within one week from today.

Sd/-

(T.V. NALAWADE, J.) rsl