

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION**

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

C.O. 1263 of 2021

Bhagwati Prasad Jhunjhunwala (HUF) & Ors.

Vs.

UCO Bank & anr.

For the Petitioners : Mr. Moinak Bose,
Mr. Sabyasachi Sen,

..... advocates

For the Opposite Party
No.1 :Mr. Sailesh Mishra

.....advocates

Heard on : 22.09.2021

Judgment on : 07.10.2021

Hiranmay Bhattacharyya, J.:-

The instant Civil Order is at the instance of the decree holders challenging an order no. 20 dated April 13, 2021 passed by the learned Judge, Commercial Court at Alipore in Money Execution case no. 06 of 2019.

By the order impugned the execution case was transferred to the Court of the learned Civil Judge (Senior Division) First Court at Alipore.

The suit for recovery of possession and mesne profit was decreed by the learned Civil Judge (Senior Division) First Court at

Alipore on March 31, 2012. The judgment debtor/ bank preferred a first appeal before this Hon'ble Court against such decree. The decree holder preferred a cross objection for modification of the decree to enable them to claim mesne profits by filing a proceeding before the Trial Court. A Division Bench of this Hon'ble Court modified the decree only to the extent that the decree holders would be entitled to file appropriate proceedings under Order 20 Rule 12 of the Code of Civil Procedure before the Trial Court. A Misc Case no. 8 of 2015 under Order 20 Rule 12 of the Code was initiated and the suit was decreed in final form so far as mesne profit is concerned which was assessed at Rs. 4,65,55,821[Rupees Four crore sixty five lakhs fifty-five thousand eight hundred and twenty one only].

The decree for mesne profit was put into execution before the learned Civil Judge (Senior Division) First Court at Alipore giving rise to money execution case no. 2 of 2019.

The learned Civil Judge (Senior Division) First Court at Alipore, by an order dated October 30, 2019 directed the record of the execution proceedings to be sent to the Court of the learned judge under the Commercial Courts Act, 2015 (for short "the 2015 Act") for further proceedings. The learned Judge, Commercial Court at Alipore by an order no. 4 dated February 6, 2020 held that the money execution case was maintainable before such Court.

The judgment debtor/bank filed a petition praying for return of the execution case along with the decree to the Court of the learned Civil Judge (Senior Division) First Court at Alipore on the

ground that the suit is not in the nature of commercial dispute and also that a title execution case arising out of the self same title suit is pending before the learned Civil Judge (Senior Division) First Court at Alipore.

The learned Judge, Commercial Court at Alipore by the order impugned directed the execution case to be transferred to the Court of the learned Civil Judge (Senior Division) First Court at Alipore. Being aggrieved, the decree holders have preferred the instant Civil Order.

Mr. Bose, the learned advocate for the petitioner contended that a decree of recovery of possession was passed against the judgment debtor/bank who was using the immovable property exclusively for trade or commerce. He, further, contended that the decree for mesne profits is nothing but realisation of money out of immovable property. Since the decree of mesne profits, in the instant case, exceeds the threshold limit for entertaining a commercial dispute by a Commercial Court, Mr. Bose submitted that the instant money execution case is to be decided by the Commercial Court only. In support of his contention that the Civil Judge(Senior Division) was justified in transferring the execution case to the Commercial Court, Mr. Bose relied upon a judgment of a Division Bench passed on December 20, 2019 in FMA 1855 of 2019 (*Cygnus Investment & Finance Pvt. Ltd. vs. M/s. Madhusala Drinks Pvt. Ltd. and others*). Mr. Bose also relied upon a judgment of the Hon'ble Supreme Court of India in the case of *Ambalal Sarabhai Enterprises Limited vs. K.S. Infraspace LLP and another* reported at (2020) 15 SCC 585 and contended that the Commercial Courts Act,

2015 was enacted to ensure speedy resolution of the commercial disputes in a time bound manner. Thus, Mr. Bose concluded by submitting that the order impugned directing transfer of the execution case is required to be set aside.

Per Contra, Mr. Mishra, learned advocate for the opposite party/bank contended that since at present there is no subsisting agreement in between the parties in respect of immovable property, the dispute between the parties cannot be said to be a commercial dispute. Thus, the Commercial Court lacks jurisdiction to execute the decree in the instant case. He, further submitted that an application for setting aside of the decree which is sought to be executed is pending before the learned Civil Judge (Senior Division) First Court at Alipore and in order to avoid conflict of outcome of the proceedings, the execution case is to be heard by the learned Civil Judge (Senior Division) First Court at Alipore. Mr. Mishra relied upon a judgment dated March 28, 2017 passed by the Delhi High Court in CS(COMM) 1353 of 2016 *Sanjeev Kumar Arora vs. Satish Mohan Agarwal*. He, further, contended that since the decree attained finality, the execution application cannot be transferred to the Commercial Court in view of the proviso to Sub-section 2 of Section 15. In support of such contention he relied upon a judgment of the Chattishgarh High Court in the case of *South Eastern Coalfields Ltd. vs. M/s. Tirupati Construction* reported at 2018 SCC Online CHH 63.

I have heard the learned advocates for the parties and have considered the materials on record.

It is not in dispute that a decree for recovery of possession against the judgment debtor/ bank was passed in respect of an immovable property used exclusively in trade or commerce. Though the bank preferred an appeal against such decree but the same was dismissed as infructuous as possession had already been handed over by the judgment debtor/ bank to the decree holder. Thereafter, in terms of the judgment and order dated May 15, 2015 passed by Hon'ble Division Bench of this Court on a cross objection, the decree holders filed a proceeding under Order 20 Rule 12 of the Code being Misc Case no. 8 of 2015 which culminated in a final decree for mesne profits. The decree for mesne profits was for Rs. 4, 65, 55, 821/- . The judgment debtor claims that a proceeding for setting aside the ex parte decree of mesne profits is pending before the learned Civil Judge (Senior Division) First Court at Alipore.

The said decree for mesne profit was put into execution giving rise to money execution case no. 2 of 2019 before the learned Civil Judge (Senior Division) First Court at Alipore.

The issue which falls for consideration is whether such decree for mesne profit is to be executed by the learned Civil Judge (Senior Division) First Court at Alipore or the same is to be executed by the Commercial Court at Alipore.

The judgment debtor/ opposite party contended that since the proceeding for setting aside the ex parte decree for mesne profits is pending before the learned Civil Judge (Senior Division) First Court at Alipore, in order to avoid conflict of outcome of the proceedings the execution case is to be decided by that court only. On the other

hand the contention of the decree holder/petitioner is that since the dispute between the parties is a commercial dispute of a high specified value, the execution case is to be decided by the Commercial Court.

The decree for mesne profit was passed on October 12, 2018 and the Commercial Courts in the district started functioning thereafter. Section 2(1)(c) of the 2015 Act defines “commercial dispute”. A dispute arising out of agreement relating to immovable property used exclusively in trade or commerce is a commercial dispute as per Section 2(1)(c)(vii). It appears from the order dated September 29, 2018 passed in Misc Case no. 8 of 2015 that the mesne profit has been assessed with effect from the date of expiry of the lease agreement i.e. 01.03.2009 till delivery of possession i.e. 15.01.2014.

Mesne profits have been defined in Section 2(12) of the Code of Civil Procedure. Mesne profits of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession. The Commissioner in the instant case assessed such mesne profits at Rs. 4,65,55,821/- and the learned Trial Judge accepted the report of the Commissioner and decreed the said suit in final form insofar as the mesne profit is concerned. The judgment debtor was directed to pay such mesne profits within the stipulated time limit failing which the decree holder shall be entitled to put the decree into execution.

Explanation to Section 2(1)(c) of the 2015 Act provides that a commercial dispute shall not cease to be a commercial dispute merely because it also involves action for recovery of immovable property or for realization of money out of immovable property giving as security or involves any other relief pertaining to immovable property.

Order 20 Rule 12 of the Code of Civil Procedure provides for passing a decree for possession and mesne profits:

“12. Decree for possession and mesne profits- (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree-

(a) for the possession of the property;

(b) for the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent;

(ba) for the mesne profits or directing an inquiry as to such mesne profits,

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until-

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.”

Record reveals that dispute arose out of an agreement relating to immovable property used exclusively for trade or commerce and a

suit for recovery of possession and mesne profits was filed. A decree in terms of the provisions laid down under Order 20 Rule 12 of the Code was passed. Thus, from the definition of the mesne profits as well as the nature of the decree passed in the instant case there is no doubt that the decree of mesne profits is pertaining to the immovable property which was used by the bank for trade or commerce. Since the decree in the instant case involves action for recovery of immovable property as well as mesne profit which is nothing but a relief pertaining to immovable property it cannot be taken out of purview of the expression “commercial dispute” defined under Section 2(1)(c) of the 2015 Act in view of the explanation appended thereto. However, all commercial disputes cannot be adjudicated by the Commercial Court but it is only those commercial disputes of high specified value which can be adjudicated by such Court.

It is not in dispute that the value of the mesne profit awarded by the decree falls within the pecuniary jurisdiction of the Commercial Court.

A decree may be executed either by the Court which passed such decree or by the court to which it is sent for execution. The court which passed decree may, on the application of the decree holder sent it for execution to another court of competent jurisdiction if the court which passed the decree considers for any reason which shall be recorded in writing that the decree should be executed by such other court (see Section 39 of CPC). Subsection 3 of Section 39 of the Code of Civil Procedure provides that for the purpose of Section 39, a court shall be deemed to be a court of

competent jurisdiction if at the time of making the application for the transfer of decree to it, such court would have jurisdiction to try the suit in which such decree was passed.

In the instant case, as on the date of filing of the application for transfer of the decree, the Commercial Court at Alipore would have jurisdiction to try the suit in which the decree for mesne profit was passed.

The learned Civil Judge (Senior Division) First Court at Alipore, by an order dated October 30, 2019, transferred the execution case to the learned judge, Commercial Court after recording reasons for such transfer. The said order had already attained finality as the same was not challenged by any of the parties to the proceedings. The learned Judge, Commercial Court directed transfer of the execution proceeding to the court of the learned Civil Judge (Senior Division) First Court at Alipore by a non-speaking order.

For the reasons as aforesaid I hold that the learned judge, Commercial Court at Alipore has jurisdiction to execute the decree for mesne profits.

In *Sanjeev Kumar Arora* (supra) the Delhi High Court held that the suit for realisation of money arising out of an agreement for sale and the counter claim of the defendant for cancellation of such agreement is not a commercial dispute. The said judgment is not applicable to the facts of the instant case.

In *Tirupati Construction* (supra), the Chhatisgarh High Court held that after the arbitration award has become final, the

execution application cannot be transferred in view of the proviso to Section 15(2) of the 2015 Act. The attention of the Chhatisgarh High Court was not drawn to the provisions of Section 36 and 39 of the Code of Civil Procedure by virtue of which an execution application can be transferred to a competent court as held by this Court. Thus, the said decision is not a binding precedent upon this Court.

It appears from the judgment dated December 20, 2019 in *Cygnus Investment* (supra) that the suit was transferred to the Commercial Court as the defendants did not raise any objection against transfer to the appropriate Commercial Court. Furthermore, the issue in the instant case is whether the execution case can be transferred to the Commercial Court.

There is, however, no quarrel to the proposition of law settled by the Hon'ble Supreme Court of India in *Ambalal Sarabhai* (supra) wherein it has been held that the Commercial Courts' Act, 2015 has been enacted for the purpose of providing an early disposal of high value commercial disputes and also that the object shall be fulfilled only if the provisions of the Act are interpreted in a narrow sense and not hampered by the usual procedural delays. In the said judgment it is, however, held that the words "used exclusively in trade or commerce" are to be interpreted purposefully. However, the said judgment is not of much assistance to the petitioner in the instant case.

For the reasons as aforesaid, this Court is of the considered view that the impugned order suffers from infirmity.

CO No. 1263 of 2021 is allowed. The impugned order being no. 20 dated April 13, 2021 passed by the learned judge, Commercial Court at Alipore is set aside.

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

All parties shall act in terms of the copy of the order downloaded from the official website of this Court.

Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(Hiranmay Bhattacharyya, J.)