

Form No. J (1)

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

Present:

The Hon'ble Justice Biswajit Basu.

C.O. 3855 of 2019

ALW ESTATES PRIVATE LIMITED
vs.
M/S RAJLAXMI INVETMENT AND TRADING COMPANY PRIVATE LIMITED
and
ELECTRIC CONSTRUCTION & EQUIPMENT COMPANY LIMITED

WITH

C.O. 3928 of 2019

M/S RAJLAXMI INVETMENT AND TRADING COMPANY PRIVATE LIMITED
vs.
ALW ESTATES PRIVATE LIMITED
and
ELECTRIC CONSTRUCTION & EQUIPMENT COMPANY LIMITED

For the petitioner:

Mr. Shakti Nath Mukherjee, Sr. Adv.,
Mr. Arindam Banerjee,
Ms. Arpita Banerjee,
Mr. Animesh Paul.

For the opposite parties:

Mr. Utpal Bose, Sr. Adv.,
Mr. Raja Basu Chowdhury,
Mr. S.N. Dutta,
Mr. Baskar Mukherjee,
Ms. Debjani Ghosh,
Ms. Nafisa Yasmin.

Heard on : 19.03.2021

Judgment on : 07.04.2021

Biswajit Basu, J.

1. These two revisional applications under Article 227 of the Constitution of India are taken up together for analogous hearing and disposal since both the revisional applications are directed against the Order No. 39 dated September 21, 2019 passed by the learned Civil Judge (Senior Division) at Sealdah in misc. Case No. 05 of 2017 arising out of Title Execution Case No. 01 of 2011.

2. ALW Estates Private Limited (hereinafter referred to as the 'ALW' in short) is the petitioner of C.O. 3855 of 2019 whereas M/s. Rajlaxmi Investment and Trading Company Private Limited (hereinafter referred to as the 'Rajlaxmi' in short) is the petitioner of C.O. 3928 of 2019.

3. The undisputed facts of this case relevant to deal with the issues involved in the present revisional application are thus, Rajlaxmi by a deed of lease dated February 01, 1956 inducted Electronic Construction and Equipment Company Limited (hereinafter referred to as the 'ECE' in short), the opposite party no. 2 in both the revisional applications, as lessee for a period of forty years in respect of more or less 20 Bighas 4 Cottahs and 9 Chittaks of land with different structures standing thereon at Premises No. 9, Kaliprasanna Singha Road, Kolkata- 700002 (hereinafter referred to as the 'leasehold property' in short). Rajlaxmi after expiry of the said period of lease filed a suit for eviction against ECE in the Court of learned Civil Judge (Senior Division) at Sealdah being Title Suit No. 12 of 1997.

4. The Rajlaxmi during the pendency of the said suit for eviction, by an agreement dated July 01, 2006 agreed to grant lease to ALW after disposal of the said suit for eviction for a period of twenty one years in respect of an area of 60,000 sq. ft. out of the entire leasehold property on the terms and conditions enumerated in the said agreement. In the said agreement, possession of eighteen business associates of ALW over the area of 60,000 sq. ft. was acknowledged and names of the said business associates of ALW were recorded under a schedule appended to the said agreement.

5. The said suit for eviction was decreed on December 18, 2010. ECE, although preferred Title Appeal No. 56 of 2010 against the said decree, but ultimately withdrew it. The said decree was put into execution in Title Execution Case No. 01 of 2011. In the said execution case, ALW has filed an application under Order XXI Rules 99 to 101 read with Section 151 of the Code of Civil Procedure for determination of the question of its status as lessee under Rajlaxmi on the basis of the aforesaid agreement dated July 01, 2006 in respect of the said 60,000 sq.ft of area which is more fully described under the schedule appended to the said application (hereinafter referred to as the 'subject property' in short). The said application has been registered before the executing Court as the misc. Case No. 05 of 2017 out of which the present revisional applications arise.

6. The prayers of ALW for stay of all further proceedings of the execution case till the disposal of the said misc. case and for recall of an order granting Police help to Rajlaxmi for execution of the said decree of eviction were refused by the

executing Court. ALW challenged the said orders in two separate revisional applications being C.O. 3840 of 2018 and C.O. 3836 of 2018.

7. The said revisional applications were allowed by the judgment and order dated June 19, 2019 by granting stay of all further proceedings of the execution case till the disposal of the said misc. Case with a direction upon the executing Court to assess the appropriate occupation charges as condition for such stay upon hearing both sides and, if necessary, permitting them to produce documentary and other evidences. The parties did not adduce any oral evidence, however, after the matter was remanded back to the executing Court, Rajlaxmi, on August 08, 2019 filed an application for fixation of said occupation charges @ Rs. 17.33 per sq. ft. per month on the basis of a report regarding market value and rental value of the subject property prepared by one Talbot and Company.

8. The executing Court by the order impugned has assessed the said occupation charges @ Rs. 5 per sq. ft. per month. The executing Court while fixing the occupation charges at the said rate, took into its consideration the clause of the said agreement dated July 01, 2006 whereby Rajlaxmi and ALW agreed that the lease rent of the subject property would be @ Rs. 3 per sq. ft. per month but enhanced the said rate to Rs. 5 per sq. ft. per month on the ground that the said agreement was executed long back. The executing Court discarded the report of the said Talbot and Company on the ground that it is a private report and the author of the report has not been examined. The occupation charge so assessed

was directed to be paid from December 18, 2010 i.e. the date of the said decree of eviction.

9. Mr. Shakti Nath Mukherjee, learned senior counsel appearing on behalf of the ALW submits that in the misc. Case, ALW is seeking determination of its right to occupy the subject property as lessee under Rajlaxmi on the basis of the independent agreement dated July 01, 2006, as such, pending determination of the said question, Rajlaxmi cannot take possession of the subject property in execution of the said decree of eviction. Mr. Mukherjee, to buttress his such argument, refers to the decisions of the Hon'ble Supreme Court in the case of **ANWARBI VS. PRAMOD D.A. JOSHI & OTHERS** reported in (2000) 10 SCC 405 and in the case of **BRAHMDEO CHAUDHARY VS. RISHIKESH PRASAD JAISWAL & ANOTHER** reported in (1997) 3 SCC 694 and also the unreported judgment of the learned Single Judge of this Court dated November 16, 2018 passed in **C.O. 3436 of 2018 (SRI AMITAVA MITTER & ORS. VS. M/S. NEELAM & ORS.)**

10. Mr. Mukherjee then submits that the executing Court was directed to "assess appropriate occupation charges", according to him, the word 'appropriate' in the context of the present case should be interpreted to include an investigation as to whether ALW is at all liable to pay any occupation charges. He takes the aid of '**WEBSTER NEW DICTIONARY AND THESAURUS (CONCISE EDITION)**', '**WORLD BOOK DICTIONARY**' and the decision of the Hon'ble Supreme Court in the case of **COLLECTOR OF CENTRAL EXCISE, VADODRA VS. DHIREN CHEMICAL INDUSTRIES** reported in (2002) 2 SCC 127 to elucidate the meaning

of the word 'appropriate'. Mr. Mukherjee relies on the decision of the Privy Council in the case of **FATEH SINGH AND ORS. VS. JAGNNATH BAKHSH SINGH AND ANOTHER** reported in **AIR 1925 PC 55** and the decision of this Court in the case of **ABDUL HAMID SARDAR VS BIJOY CHAND MAHATAP & OTHERS** reported in **AIR 1932 (CAL) 108** to contend that the direction for determination of "appropriate occupation charges" cannot obliterate the requirement of the aforesaid investigation as no direction and/or liberty granted by the Court in favour of a party to a proceeding can create a right contrary to law. Mr. Mukherjee concludes that the executing Court by proceeding to determine the quantum of the occupation charges sans such investigation has committed a jurisdictional error.

11. Mr. Mukherjee, on the issue of quantum of the occupation charges submits that Rajlaxmi in the year 2015 has inducted some other lessees in respect of different portion of the leasehold property @ Rs. 1.52 per sq. ft. per month, as such, the said occupation charges, if at all payable by ALW, cannot be more than the said rate. He alternatively submits that the rate of lease rent was fixed by the terms of the said agreement dated July 01, 2006 at Rs. 3 per sq. ft. per month with an enhancement of 10% every 3 years. He submits that the rate so agreed upon by the parties cannot be altered by the Court and in support of his such contention, he relies on the decision of the Hon'ble Supreme Court in the case of **RAM KUMAR DAS VS. JAGADISH CHANDRA DEB DHABAL DEB & OTHERS** reported in **AIR 1952 (SC) 23**.

12. Mr. Mukherjee on the point from which date the said occupation charges is payable contends that so long ECE is not dispossessed from the leasehold property in execution of the decree of eviction, ALW being sub-lessee cannot be touched, and in support of his such contention, he relies on the decision of the Division Bench of this Court in the case of ***IN RE: GANESH TRADING CO. PVT. LTD.*** reported in **AIR 1985 (CAL) 37**. According to him, since Rajlaxmi has not yet obtained the possession of the leasehold property from ECE in execution of the said decree of eviction and since Rajlaxmi has not yet executed the deed of lease in terms of the agreement dated July 01, 2006, the period for payment of such occupation charges by ALW, if at all, cannot commence. Further argument of Mr. Mukherjee on this point is that ALW, in terms of the direction of the Division Bench passed in an appeal being SMAT 02 of 2018 preferred by ALW, deposited a sum of Rs. 2 crores as the condition for stay of the execution case but since Rajlaxmi did not withdraw the said amount, the same was withdrawn by ALW itself in terms of the order dated August 24, 2018 passed by the Hon'ble Supreme Court in the Special Leave Petition arising out of the said appeal. Therefore, according to him, liability of payment of occupation charges, if any, cannot be fixed upon ALW till August 24, 2018, such liability, at best, can commence on and from June 19, 2019 when the earlier two revisional applications i.e. C.O. 3840 of 2018 and C.O. 3836 of 2018 were allowed and the executing Court was directed to "assess appropriate occupation charges".

13. Mr. Utpal Bose, learned senior counsel appearing on behalf of the Rajlaxmi submits that in view of the specific direction to determine the “appropriate occupation charges” as the condition for grant of stay of the execution case, there is no scope for investigation as to whether ALW has any liability at all to pay such charges to protect its possession over the subject property during the pendency of the said misc. Case. He submits that the questions to be determined in the present revisional applications are limited to what should be the proper quantum of the said occupation charges and from which date such charges is payable.

14. Mr. Bose, to justify the prayer of Rajlaxmi for fixation of the said occupation charges at the rate more than the rate fixed by the executing Court firstly refers to an order passed in C.O. 3565 of 2012 arising out of the appeal filed by ECE against the decree of eviction whereby the occupation charges was fixed @ Rs. 20 lakhs per month, subsequently reduced to Rs. 19 lakhs per month as the condition for grant of stay of the execution case and contends that if the said two rates are taken into account, the occupation charges cannot be less than Rs. 8.33 per sq. ft. per month. He further submits that Talbot and Company is a reputed valuer; the executing Court is not justified in discarding the said report merely because it was prepared at the instance of decree-holder, if the said report is taken into account, the rate of said occupation charges should be Rs. 17.33 per sq. ft. per month.

15. On the issue from which date the said occupation charges is payable, Mr. Bose submits that ALW is claiming to be in possession of the subject property on

and from the date of execution of the agreement dated July 1, 2006 and admittedly, no payment in terms of the said agreement has been made since August 2007 therefore, according to him, ALW is liable to pay the said occupation charges from August 2007, not from the date of the said decree of eviction as directed by the executing Court.

Heard learned counsel for the parties, perused the materials-on-record.

16. The obstructionist of a decree when invites the executing Court to determine the question of his right, title and interest over the decretal property or any part of it under Order XXI Rule 101 of the Code, on an application under Rule 97 or Rule 99 thereof, such question is required to be determined before dispossession of the said obstructionist from the decretal property or from any part of it in execution of the said decree, this is the proposition of law enunciated by the Hon'ble Supreme Court in the case reported in **(2000) 10 SCC 405 (supra)**. It is not the natural corollary of the said proposition of law that pending determination of the said question, the obstructionist, to protect his possession over the said property, is not required to comply any reasonable term to compensate the decree-holder for loss occasioned by delay in execution of decree by grant of stay order. *"An applicant for order of stay must do equity for seeking equity"* (see **ATMA RAM PROPERTIES (P) LTD. VS. FEDERAL MOTORS (P) LTD.** reported in **(2005) 1 SCC 705**). The unreported decision of the learned Single Judge of this Court in the case of **SRI**

AMITAVA MITTER & ORS. VS. M/S. NEELAM & ORS (supra) is not laying down the general proposition of law that such obstructionist is not required to comply any condition for stay of execution of the decree pending adjudication of his right, title and interest over the decretal property.

The question whether the said terms and/or conditions for stay of the decree under execution should be, at all, imposed upon such obstructionist or not is to be determined on the basis of the facts and circumstances of the each case.

17. The decision of the Hon'ble Supreme Court in the case reported in **(1997) 3 SCC 694 (supra)** is no pointer in deciding the issues involved in the present revisional applications, inasmuch as in the said decision it has been held that it is an erroneous view that the stranger to the decree has no *locus standi* to get adjudication of his claim prior to the actual delivery of possession to the decree-holder in the execution proceeding.

18. The executing Court was directed to "assess appropriate occupation charges as condition for such stay". The said direction restricts the investigation of the executing Court only to ascertain the befitting occupation charges on the basis of relevant factors. Therefore, in view of the said specific direction, there is no scope to interpret the word "appropriate" in a manner to bring the question of liability of ALW to pay occupation charges as the condition for stay within the sweep of the said investigation, as suggested by Mr. Mukherjee.

19. ALW in the misc Case No. 05 of 2017 is seeking determination of a question regarding his status over the subject property on the basis of the agreement dated

July 01, 2006 and in terms thereof, ALW is liable to pay lease rent. Hence, ALW cannot evade its liability to make payment to Rajlaxmi to protect its possession over the subject property pending determination of the question raised by it in the said misc. Case and in view thereof, the direction passed in the earlier revisional applications to assess appropriate occupation charges was well within the power of the learned Single Judge, consequently, the decisions of the Privy Council reported in **AIR 1925 (PC) 55 (supra)** and the decision of the Division Bench of this Court reported in **AIR 1932 (CAL) 108 (supra)** cited by Mr. Mukherjee are misplaced.

20. The claim of ALW is based wholly on the agreement dated July 01, 2006 in which Rajlaxmi was the party of the first part and ALW was the party of the second part. The clauses of the said agreement governing the rate of lease rent and increase thereof are quoted below for ready reference:-

“3. The Party of the Second part has agreed to pay @ Rs.3/= per sq. ft. on account of 60,000/- sq. ft. occupied by his business associated in the said premises No. 9, Kali Prasanna Singhee Road, Kolkata – 700 002, for a term of 21 years lease to safe guard his own interest as is where is basis:

4(a). That pending the said title suit No. 12/1997 and disposal of the same, the party of the first part will accept the party of the second part as intending lessee under it, subject to the disposal of the said suit and measurement of the actual area under the possession of the business associates of party of the second part and ad hoc basis pending measurement of the occupied sq. ft. as represented by the party of the second part thereby paying a monthly ad hoc lease amount/fees of Rupees 1,80,00 (Rupees one lakh eighty thousand) only per month to be paid in advance for each month it is due within the 7th day of every month.

4(f). An increase of 10% every 3 years will be made on the existing lease amount as per law on the prevailing lease

amount as mentioned in clause 4(a) herein due to be paid by the party of the second part.”

21. In view of the aforesaid clauses in the said agreement, regarding rate of lease rent and increase thereof, particularly when the said agreement has not yet been impeached by either of the parties to the present *lis*, no other document is relevant to determine the appropriate occupation charges, be it any order/orders passed in any earlier proceedings in connection with the leasehold property or any document whereby new lessees have been inducted in the said property or any independent valuation report in respect of the subject property.

22. The executing Court, therefore, has rightly relied on the said agreement in assessing the amount of occupation charges but fixing the said charges @ Rs. 5 per sq. ft. per month is amounting to varying the contract between the parties as it is rightly pointed by Mr. Mukherjee relying on the decision of the Hon'ble Supreme Court reported in **AIR 1952 SC 23 (supra)** wherein at paragraph 15 has held that “it is one thing to say that in the absence of a valid agreement, the rights of the parties would be regulated by law in the same manner as if no agreement existed at all; it is quite another thing to substitute a new agreement for the parties which is palpably contradicted by the admitted facts of the case.”

23. The next question falls for consideration is from which date such occupation charges is payable. ALW has prayed for stay of the execution case levied to execute the decree of eviction against ECE. Therefore, the date of the said decree is the only relevant consideration to answer the aforesaid question. The executing Court, therefore, has rightly fixed the liability of payment of occupation charges on and

from December 18, 2010 i.e. the date of the said decree of eviction. Pre-decree default in payment in terms of the said agreement cannot be considered in the present case as it is beyond the scope of the connected execution case, as such, I am unable to convince myself to accept the argument of Mr. Bose on this score.

24. The Division Bench of this Court in the case reported in **AIR 1985 (CAL) 37 (supra)** has considered the questions “as to whether the order for eviction as passed against the lessee by itself determines the lessee’s title to realise rent from the sub-lessee and whether such an order even before its execution can constitute eviction by title paramount.” The issues under consideration in the present revisional applications are completely different; as such, the said decision has no manner of application in the present case.

25. Summing up the discussions made above, the rate of occupation charges and enhancement thereof are fixed at the rate agreed upon by the parties in the said agreement dated July 01, 2006, according to the said agreement, the present monthly occupation charges of the subject property is Rs. 2,63,538 (Two lakhs sixty three thousand five hundred thirty eight rupees only) calculated @ Rs. 4.39 per sq. ft. per month. The arrear occupation charges on and from December 18, 2010 till April 2021 calculated on the basis of the terms of the said agreement is **Rs. 2,65,95,390** (Two Crores sixty five lakhs ninety five thousand three hundred ninety rupees only), the detailed calculation of the said arrear occupation charges is as under:-

CALCULATION CHART OF ARREAR OCCUPATIONAL CHARGES				
<u>Period</u>	<u>Rate in rupees Per sq. ft per month</u>	<u>Amount payable per month</u>	<u>Period in months</u>	<u>Total amount</u>
Dec 2010 to June 2012	3.3	Rs. 1,98,000/-	18m14d	198000 X 18= Rs. 11,69,418/-
July 2012 to June 2015	3.63	Rs. 2,17,800/-	36	217800 X 36= Rs. 78,40,800/-
July 2015 to June 2018	3.993	Rs. 2,39,580/-	36	239580 X 36= Rs. 86,24,880/-
July 2018 to April 2021	4.3923	Rs. 2,63,538/-	34	263538 X 34= Rs. 89,60,292/-
Total arrear occupation charges				Rs. 2,65,95,390/-

26. The ALW is required to pay the abovementioned arrear occupation charges to Rajlaxmi by four equal monthly instalments along with current monthly occupation charges. First of such instalments is payable within **May 07, 2021** and thereafter the current monthly occupation charges along with the rest of the instalments of the arrear occupation charges are required to be paid within 7th of each succeeding months.

27. The execution case has been levied to execute the decree in respect of the entire leasehold property, the claim of ALW since is in respect of only a part of the decretal property, there is no justification to put the entire execution case on halt pending determination of the said question raised by ALW in misc. Case No. 05 of 2017. Therefore, the execution case so far as it relates to the property described under the schedule to the said misc. Case shall remain unconditionally stayed till

the end of the month of May, 2021 and in the event the payments are made as directed above, the said stay shall continue till the disposal of the misc. Case. No. 05 of 2017, in default of any of the aforementioned payments, the stay hereby granted shall automatically stand vacated and the decree shall be executable at once in its entirety.

C.O. 3855 of 2019 and C.O. 3928 of 2019 are disposed of by modifying the order impugned to the extent indicated above without any order as to costs.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(BISWAJIT BASU, J.)