

IN THE HIGH COURT AT CALCUTTA**(Criminal Revisional Jurisdiction)****Appellate Side**

Present:

The Hon'ble Justice Bibhas Ranjan De

C.O. 305 of 2019

Tapas Ranjan Kundu Chowdhury @ Tapas Ranjan

Vs

Archana Mukherjee & Anr.

For the Petitioner

: Ms. Sabita Mukherjee Roy Chowdhury

Ms. Rajasree Paul

Mr. Sanket Das

Heard on

: March 25, 2022

Judgment on

: April 08, 2022

Bibhas Ranjan De, J.

1. This revision application under Article 227 of the Constitution of India is directed against the Order No. 9 dated 28th September, 2018, passed by the Ld. Chief Judge, City Civil Court at Calcutta in connection with Title Appeal no. 15 of 2018.

Facts in brief

2. Petitioner/respondent filed one eviction suit being no. 333 of 1986 (re-numbered as 1898 of 2001). The said suit was decreed on 30th

November 2017 by the Ld. Judge, 2nd Court, Presidency Small Causes Court at Calcutta.

3. Being aggrieved by and dissatisfied with the said judgement and decree preferred an appeal being Title Appeal no. 15 of 2018. In the appeal, opposite parties/ appellants presented one application for stay of execution and the Ld. Judge passed an order on 31st July, 2018 directing stay of the judgement and decree passed in Title suit No. 1898 of 2001 subject to payment of occupational charge @ Rs. 10,000/- per month with effect from, the date of decree i.e 30th November 2017.

4. Being aggrieved, opposite parties/ appellants filed one application under Section 151 Civil Procedure Code with a prayer for reconsideration of occupational charge of Rs. 10,000/- per month to any reduced amount. Accordingly, Ld. Judge by his order dated 28.09.2018 reduced the rate of occupational charge from Rs. 10,000/- to 7000/-.

Order assailed:

5. At the outset, I find it necessary to reproduce the impugned order as follows:

*“ Ld. Advocates for both sides are present by
filing their respective haziras.*

Date is fixed for hearing of the petition u/s. 151 C.P.C filed by the appellants on 11.09.2018 praying for reconsideration of occupational charges of Rs. 10.000/- to any reduced amount and also for extension of time to deposit the said amount and arrear occupational charges.

Heard both sides. Perused the petition. Considered.

It is submitted by the appellants that Ejectment Suit being No. 1898 of 2001 was decreed on contest by the Judgement and Decree dated 30.11.2017 passed by the Ld. Judge, 2nd Bench, presidency Small Causes Court, Calcutta in favour of the plaintiff/respondent. Thereafter, these appellants being aggrieved by and dissatisfied with the said Judgement and Decree, preferred the instant Title Appeal No. 15 of 2018 with a prayer for stay wherein this court was pleased to direct the appellants to

pay occupational charges @ Rs. 10,000/- per months within 15th day of each succeeding English Calendar month from the date of decree and the arrears to be paid by 29.09.2018. It is further submitted that the said order was passed on the basis of a sketch map, as well as a report of Engineer Valuer engaged by the respondent at the time of filing written objection against the stay petition and measurement has been considered as 475 sq. feet, which is not at all correct. It is also stated that the appellants actually holding 100 sq. feet more or less including macha, which has been described by the Engineer and this court was misled by the submission of the respondent and huge amount of occupational charges was ordered.

On the other hand, the respondent by filing written objection denied the entire application for reconsideration of occupational charges and it is highlighted that this respondent has

got the decree after prolong 32 years of fighting tooth and nail with the appellants and the appellants have been running business of fast food and beverages on the ground floor and a beauty parlour in the mezzanine floor of the said premises. So, occupational charges adjudicated by this court was just and proper for the purpose of granting stay of the said judgement and decree. Finally, The respondent has prayed for rejection of the prayer u/s. 151 C.P.C regarding reconsideration and reassessment of the quantum of occupational charges.

The appellant have also filed an Affidavit as to measurement of the decreetal room and submitted that he occupies 230.20 sq. feet and not 475 sq. feet and in this contest, sketch map has also been filed in support of the area in occupation of the appellants.

The appellants/defendants have also highlighted his financial hardship arising out

of his chronic ailment and documents to that effect has also been filed.

Having heard the submissions of Ld. Advocates for both sides and on perusal of the record, this court finds that in the suit premises, i.e. in the schedule of the plaint there is no description about the quantum in sq. feet being possessed by the appellants/defendant. However, it appears that one shop room is being occupied on the ground floor of premises No. 162, Bipin Behari Ganguli Street, P.S. – Muchipara, Kolkata – 700012 and this court having considered the area of the suit premises as well as location of the suit premises, assessed occupational charges @Rs. 10,000/- per month. There was no dispute in the Ld. Trial Court as regards the area being possessed by the appellants/defendants. However, it appears that tenancy in respect of small height rooms is at a rental of Rs. 115/- per month. It is also

*transpires from the judgement that the area under tenancy of the appellants is being used for the purpose of business. It also transpires that it is a very posh area of Bipin Behari Ganguli Street, which is a business place also. So, from all corners, this court finds that occupational charges subject to the area of business place is not at all very high as ordered by this court. **However, considering another issue that respondent is suffering from serious ailment and under prolong treatment, of which document has been filed to that effect, this court views that to some extent a modification may be done to support the appellants financially in her crisis. So, occupational charges of Rs. 10,000/- per month is modified to the extent of Rs. 7,000/- per month and the arrears of occupational charge from 30.11.2017 to 28.09.2018***

should be allowed to be deposited in easy instalment.

Other orders as it stands remain as usual.

The petition u/s. 151 C.P.C. is thus disposed of in favour of the appellants on contest with the observation that the earlier order dated 31.07.2018 be modified to the extent that the amount of occupational charges shall be Rs. 7,000/- per month instead of 10,000/- per month, with effect from the date of decree of the Ld. Trial Court, i.e 30.11.2017 and the arrear amount of occupational charges on and from 30.11.2017 to 28.09.2018 to be deposited by five (5) equal monthly instalments before the Ld. Trial Court.

On fulfilment of this condition and direction, the stay order shall remain operative, failing which the stay order shall stand vacated automatically without any further reference.

*L.C.R has already been received. Let
the case record be transferred to the file of Ld.
Judge, Bench-XII, City Civil Court, Calcutta,
for hearing the Appeal.*

To 5.10.18 for appear before the Ld.

Transferee Court on the date fixed.”

6. Ld. Advocate appearing on behalf of the petitioner/respondent contended much about area of the premises in question and location thereof. It is submitted that Ld. Judge could not apply his judicious mind as to area of the premises in question as well as location thereof. It is further submitted that Ld. Judge considered immaterial plea of serious ailment of one of the opposite parties/ appellants and came to his erroneous finding. Ld. Advocate on behalf of the petitioner/respondent strenuously argued on the enhancement of occupational charge in view of area of the premises in question and location thereof.

Decision

7. Albeit Ld. Judge granted stay of execution of judgement and decree passed in Title Suit no.1898 of 2001 by his Order No. 5 dated 31.07.2018 subject to payment of occupational charge of Rs. 10.000/- per month but, on 28.09.2018 Ld. Judge modified his earlier order by reducing the quantum of occupational charge from Rs. 10,000/- to Rs. 7,000/-. By the impugned order Ld. Judge reduced the

occupational charge only on the ground of serious ailment of the respondent.

8. The underlying principle based on which the Code of Civil Procedure, 1908 functions is ***Ubi Jus Ibi Remedium*** that signifies where there is a right, there is a remedy. The concept of mesne profits or occupational charge has been developed from this principle because it is the law of nature to provide the right to compensation where there has been an infringement or breach of a legal right. The assessment of the quantum of occupational charge or mesne profit is rightly left at the discretionary power of the Court depending on the facts and circumstances of each case. The Courts are required to consider various factor while determining the quantum of occupational charge and thereby use their power judiciously. The discretion of the Court to determine the quantum of occupational charge is based on the following:

- 8.1 Nature and condition of the property;
- 8.2 Location of the property;
- 8.3 Value of the property;

9. On careful perusal of the Order No. 5 dated 31.07.2018 passed by the Ld. Chief Judge I find that Ld. Judge stay the judgement and decree dated 30.11.2017 passed by the Ld. Judge 2nd Bench, Presidency

Small Causes Court, Calcutta, in connection with Ejectment Suit No. 1898 of 2001, subject to payment of occupational charge @ Rs. 10,000/- per month. Ld. Judged considered the location of the premises and purpose of use thereof and also considered the measurement of the premises in question and prevailing market of fair rent thereof based on report of Engineer Valuer, filed on behalf of the Petitioner/respondent.

10. On behalf of opposite parties/appellants filed one application under Section 151 of Code of Civil Procedure contending inter alia that measurement of suit premises was 100 sq. ft. more or less not 475 sq. ft. according to sketch map prepared at the behest of petitioner/respondent and made a prayer for reconsideration of occupational charge assessed by the order dated 31.07.2018. the Ld. Judge took up that application on 28.09.2018 and passed an order justifying the rate of occupational charge passed in order dated 31.07.2018 but considering the serious ailment of respondent the Ld. Judged reduced the occupational charge from 10,000/- to Rs. 7,000/- per month.

11. By the application under Section 151 of the Code of Civil Procedure, opposite parties/appellants challenged the order passed on 31.07.2018 on the ground that the same was passed on the basis of a sketch map

as well as a report of Engineer Valuer engaged by the respondent at the time of filing written objection against stay application. According to opposite parties/appellants the measurement of the premises in question was wrongly made as 475 sq. ft. It was pleaded in the petition that measurement of the premises in question was hardly 100 sq. ft. more or less including 'macha', which was described by the engineer as mezzanine floor. For that reason, opposite parties/appellants prayed for reduction of the said occupational charge. So far as serious ailment is concerned there is no averment in the application under Section 151 of Code of Civil Procedure. But, the Ld. Judge reduced the amount of occupational charge from Rs. 10,000/- to Rs. 7,000/- solely on the ground of serious ailments and prolonged treatment of one of the opposite parties/appellants, which cannot be the subject matter of assessment of occupational charge.

- 12.** On careful perusal of the order dated 31.07.2018 and also the order dated 28.09.2018 I find that Ld. Judge only relied on the Engineer Valuer report filed on behalf of the petitioners/respondents and came to his finding without any independent assessment of reasonable occupation charges taking into consideration of the actual measurement of the premises in question disputed in application under Section 151 of the Code of Civil Procedure.

- 13.** In such view of the matter, I am inclined to exercise the supervisory jurisdiction of this Court under Article 227 and set aside the Order No. 9 dated 28.09.2018 passed by the Ld. Chief Judge, City Civil Court, Calcutta, in Title Appeal No. 15 of 2018 and remand the matter back to the Court of Ld. Chief Judge for deciding the matter after making an independent inquiry as to the measurement of premises in question by an expert. It is expected that the said decision would be taken expeditiously, preferably within a period of one month from the date of communication of this order, after hearing parties.
- 14.** With the aforesaid direction, the instant application under Article 227 of the constitution of India, stands disposed of. There shall be no order as to costs.
- 15.** The copy of this order be communicated to the Ld. Judge, Bench-XII, City Civil Court, Calcutta for compliance, at once, by the department.
- 16.** All parties to this revisional application shall act on the server copy of this order downloaded from the official website of this Court.
- 17.** Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.