

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

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

**C.O. 3641 of 2018
With
CAN 1 of 2022**

**Duncun International (India) Ltd.
Vs.
Anglo India jute Mills Co. Ltd. & Ors.**

For the Petitioner	:	Mr. Aniruddha Chatterjee Mr. Rajarshi Dutta Mr. Debangha Basu
For the Opposite party	:	Mr. Sabyasachi Chowdhury Mr. Siddhartha Banerjee Mr. Shaunak Mukhopadhyay
Heard on	:	22.09.2022
Judgment on	:	13.12.2022

Ajoy Kumar Mukherjee, J.

1. Subject matter of challenge in the present application is order dated 5th July, 2018 passed by the learned Civil Judge (Senior Division) 1st Court at Alipore in Title Suit No. 53 of 2001. Petitioner contended that petitioner was the defendant No.1 in the suit for eviction filed by the opposite party no. 1 against present petitioner and opposite party no. 2 and 3. The opposite party

no. 2 and 3 have been impleaded in present proceeding by the petitioner without seeking any relief against them. Said opposite party no. 1 filed a suit for eviction mesne profit and other relief against the present petitioner and opposite party no. 2 and 3 in the aforesaid suit. The opposite parties/defendant contested the suit by filing written statement. Said suit was decreed vide judgment and decree dated 31st July 2008 and court below granted *inter alia*, the decree for recovery of possession of suit property from the petitioner and opposite party no. 2 and 3 and further the court below also granted decree of mesne profit against defendants from February 1994 till recovery of possession at the rate to be assessed and or calculated in a separate proceeding under Order XX Rule 12 of the Code of Civil Procedure 1908 (C.P.C.). The opposite party then filed execution case and petitioner and opposite party no. 2 and 3 preferred appeal against the said decree but during pendency of the said appeal the opposite party no. 1 handed over possession of the suit property through court baliff and as such the said appeal was dismissed by this court.

2. Opposite party no. 1 pursuant to the leave granted by the judgment and decree dated 29th April, 2014 initiated a separate proceeding for inquiry and ascertainment of mesne profit under the provisions of Order XX Rule 12 read with section 151 of the code. In the said proceeding opposite party no. 1 filed an application under Order XXVI Rule 9 of the code, praying for appointment of commissioner for the purpose of inquiry for assessing the fair rental value of the suit property for the period commencing from February 1994 till December,

2011 and submit report thereon before the court below. The petitioner contested the said application and learned court below by the impugned order was pleased to allow the said application filed by the opposite party no. 1 under Order XXVI Rule 9 of the code and one advocate has also been appointed as commissioner by that order.

3. Mr. Chatterjee learned counsel appearing on behalf of the petitioner submits that the court below ought not to have allowed the application made under Order XXVI Rule 9 of the code, in the facts and circumstances of the present case. Said application has been made to fish out evidence in the proceeding for adjudication of mesne profit to be made in terms of the aforesaid judgment and as such the application being in the nature of fishing out evidence is not maintainable in the eye of law and is liable to be dismissed. Moreover the advocate who is being appointed as commissioner may not possess the requisite expertise knowledge in the field of assessing fair rental value of immovable property. Practically the court below has not disclosed any reason why local investigation commission by an advocate commissioner is required for assessing the fair rental value for the concerned period. While passing the impugned order learned judge has in fact assisted the opposite party no. 1 in collecting evidence although the opposite party no. 1 could have and in fact have obtained evidence with regard to the fair rental value of the suit property. Accordingly petitioner has prayed for setting aside the order impugned. In this context petitioner relied upon **AIR 1978 Cal 296**

4. Mr. Choudhury learned counsel appearing on behalf of the opposite party submits that for the purpose of assessing fair rental value of the suit property for the said period, it is necessary for appointment of commissioner to assess the same upon local investigation commission and to file a report thereon before the court below. In this context he has relied upon the provisions as laid down in Order XXVI Rule 9 of the C.P.C.

5. Before going through to the further details let me reproduce Order XXVI Rule 9 of the code of Civil Procedure.

“Order 26 Rules 9 – Commissions to make local investigations

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.”

6. In this context the provisions as laid down in Order XX Rule 12 may also be reproduced:-

“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.”

7. Mesne profits are something which a plaintiff cannot evaluate and it is solely for the court to determine, on the basis of materials available before it. The test set by the definition in section 2(12) of the code is clearly the profits which the person in wrongful possession actually received or might with ordinary diligence have received from the property together with interest and not the original claimant loses by his exclusion. On conjoint reading of the aforesaid two quoted provisions, it is clear that in any suit or proceeding, the court may allow local investigation commission for the purpose of ascertaining the amount of mesne profit under Order XX Rule 12 and in the proceeding for mesne profit the court has a discretionary power to order for making inquiry as to rent or mesne profit for the relevant period. On perusal of the impugned order, it appears in order to ascertain the amount of mesne profit as ordered in

the judgment and decree, the court below has exercised its discretion in regard to ascertainment of rental value of the suit property for the relevant period. The test to determine the quantum of mesne profits is how much profit defendant might have received from the property with ordinary diligence. Order XX Rule 12 (ba) & (c) confers power upon court for directing an inquiry as to mesne profit. The word “inspection” as used in order XXXIX Rule 7 of the code has got no relationship with the direction for making inquiry in order to ascertain mesne profit in terms of order XVI, Rule 9, read with order XX, Rule 12 C.P.C. Order XVI, Rule 9 speaks about ascertaining of mesne profit. The question of fishing out evidence can arise in case of a local inspection commission but not in case of investigation /inquiry granted under order XXVI, Rule 9, read with Order XX, Rule 12 of the code and as such principle laid down in **AIR 1978 Cal 296** is not applicable in the present context. Even the court can make order for inquiry suo moto if deems necessary to the court for the purpose of the elucidating the matter in dispute and if the court exercises such discretion ordinarily there should not be interference by this court. Accordingly exercise of such discretion by the court below is not perverse. In view of above I find no reason to interfere with the order passed by the court below.

8. C.O. 3641 of 2018 is accordingly dismissed. Court below is directed to pass necessary orders directing investigation commissioner to conduct investigation work as ordered, at the earliest and to submit a report before the court below, preferably within a period of three months from the date of receipt of order.

All connected application is also disposed of accordingly.

However there will be no 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.

(AJAY KUMAR MUKHERJEE, J.)