

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Original Side

Present:- Hon'ble Justice I. P. Mukerji
Hon'ble Justice MD. Nizamuddin

APD 62 of 2016
CS 297 of 1989
GA/1/2016 (old GA 529/2016)

Ambalal Sarabhai Enterprises Limited
Vs.
Rajeev Daga & Anr.

For the Appellant : **Mr. Utpal Bose, Senior Adv.**
Mr. Debdoot Mukherjee, Adv.
Mr. Dhillon Sengupta, Adv.
Mr. Meghajit Mukherjee, Adv.

For the Respondents : **Mr. Jishnu Saha, Sr. Adv.**
Ms. S. Mukherjee, Adv.
Ms. Surabhi Banerjee, Adv.
Mr. T. Nandi, Adv.

Judgment on : **21.01.2022.**

I. P. MUKERJI, J.-

During the pendency of the suit, at the instance of the respondents/plaintiffs an order was passed by the learned interlocutory judge appointing a Special Officer to take physical possession of the demised premises. It appears that on 21st October, 1993, the Special Officer proceeded to take possession at 4 p.m. He was able to take it by 6 p.m. on that day as recorded in the minutes of the meeting held by him. The appellant's representative was not to be found in the property. It was locked. A watchman opened the door. Thereafter possession was taken. Mr. Saha, learned senior advocate appearing for the respondents submitted that the appellant continued to keep their articles in the premises and took no step whatsoever to get the Special Officer discharged. From 21st October, 1993 till 24th April, 2014 physical possession was retained by him. On 25th April, 2014 the respondents obtained its possession, from the special officer after the special leave petition against the division bench judgement of our court dated 5th December, 2013, affirming the decree of the trial court

dated 15th July, 2013 directing eviction of the appellant was finally dismissed by the Supreme Court.

This appeal was argued only on one short point.

Whether the respondents are entitled to mesne profit for the period of 21st October, 1993 till 24th April, 2014 when the property was in the actual physical possession of a Special Officer appointed by this court?

The learned single judge by his impugned judgment and order dated 11th August, 2014 held that the respondents were so entitled to, as determined by the Special referee appointed by this court, in his report signed on 16th June, 2014.

The appellant appeals to this court from this judgment and order.

Now, the facts need to be told in some detail.

In 1989, a suit was filed by the respondents against the appellant claiming a decree for possession of 2886 sq ft. of the mezzanine floor along with the parking space in the courtyard of Anuj Chambers situated at 24, Park Street, Kolkata. The ground for eviction of the appellant was trespass. Standard Pharmaceutical Ltd. was a monthly tenant under the respondents. This company in 1983 merged with the appellant and stood dissolved. The respondents alleged wrongful transfer by the Company to the appellant and accused the appellant of trespass into the premises. They claimed their eviction and mesne profits from May 1986.

The appellant filed their written statement, documents were discovered and the suit went to trial. It was tried before Mr. Justice Soumen Sen. On 15th July, 2013 it was decreed by his lordship.

The judgment and decree held that the appellant was liable to be evicted from the suit premises. A decree followed for recovery of its khas possession. The finding in the last paragraph of the judgment is most crucial and of paramount importance. It is in the following terms:-

“Since the defendants are in wrongful occupation of the suit premises since 1986, the plaintiffs shall be entitled to mesne profits from May 1986 till recovery of possession and Mr. Samrat Sen, a member of the bar, is appointed as special officer to compute the mesne profits and submit the report before this Court within a period of eight weeks from date of communication of this order.

*Mr. Sarkar, learned counsel for * defendants, prayed for stay of operation of the judgment and decree. The same is considered and rejected.”*

First, the learned trial judge held that the appellant was in wrongful possession of the suit premises since 1986. Secondly, it was held that the respondents were entitled to mesne profit from May, 1986 till recovery of possession. A member of the bar was appointed as a Special Referee to compute the mesne profits in terms of this judgment.

The appellant appealed from this judgment and decree before a division bench of this court. On a perusal of the judgment and decree dated 5th December, 2013 passed on appeal it does not appear that a single contention was made challenging the finding of the learned single judge that the appellant was in wrongful possession of the premises from May, 1986 and that the respondents were entitled to mesne profits for the entire period from that time till the recovery of possession. The appointment of the Special Referee was also not challenged. The contentions of learned counsel for the appellant quoted in the judgment are reproduced below:

“CONTENTIONS:- Mr. Shyama prasad Sarkar learned Senior Counsel appearing for the appellant contended as follows:

- i) Learned Judge failed to construe the agreement for tenancy that would include successor and assigns moreover, the sister concerns were also allowed to enjoy the tenancy along with the original tenant.*

- ii) *The proposition of law laid down by the Apex Court in the case of M/s. General Radio and Appliances Company Limited and others Vs. M.A. Khader reported in 1986 Volume-II Supreme Court Cases Page-656 would not be applicable as it was not a case of voluntary transfer.*
- iii) *Assuming the original tenant was dissolved by virtue of the Order of Amalgamation, the landlord would not be entitled to get a decree for possession as by conduct of parties creation of fresh tenancy in favour of Ambalal was established.”*

The Division Bench dismissed the appeal.

The appellant preferred a special leave petition before the Supreme Court of India. On 24th March, 2014, it was dismissed by a single line order.

On or about 31st March, 2014 the respondents made an application before this court for discharge of the Special officer who was in possession of the property from 21st October, 1993. Possession was obtained by the respondents from the Special Officer on or about 25th April, 2014.

After dismissal of the special leave petition the Special Referee entered upon the reference. Both oral and documentary evidence were adduced before him by the parties. Before the Special Referee, one of the points in defence taken by the appellant was that a Special Officer appointed by an order on 20th October, 1993 took physical possession of the suit premises on 21st October, 1993. The respondents have not taken “proper and expeditious steps for disposal of the suit” and hence could not maintain their claim for mesne profits.

However, one of the issues framed in the reference was whether the respondents could claim mesne profits for the period from 21st October, 1993 to 24th April, 2014 when possession of the subject property was with the Special Officer. That is to say whether this period would be deducted

from the period stipulated in the decree from May, 1986 for calculation of mesne profits.

The Special Referee very neatly decided the point. He ruled that the decree of the court dated 15th July, 2013 contained a finding that the appellant was in wrongful occupation of the suit premises since 1986 and that the respondents would be entitled to mesne profits from May, 1986 till recovery of its possession. The Special Referee considered himself bound by this mandate and found himself unable to decide the objection of the appellant. He ruled that this ground for resisting mesne profits should have been raised by the appellant on appeal from the decree before the division bench or in the special leave petition before the Supreme Court of India. Since, the point was not raised it could not be raised before him. The Special Referee by his report dated 16th June, 2014 awarded mesne profits in favour of the respondents from May, 1986 to 24th April, 2014 for a total sum of Rs.33,33,99,128/- together with interest.

On or about 10th July, 2014, the respondents made an application before the learned single judge challenging the fixation of liability for municipal taxes and grant of interest in the said report but accepting the rest of it. The appellant challenged the report by another application only to the extent that they were not liable to pay mesne profits from 21st October, 1993 to 24th April, 2014. Affidavits were exchanged by the parties in both applications.

Both the applications were heard together.

By a judgment and order dated 11th August, 2014, a learned single judge of this court substantially upheld the report of the special referee with regard to the award of mesne profit. The learned judge held that the finding that the appellant was in wrongful occupation of the suit premises from May, 1986 till the recovery of its possession by the respondents could not be reopened by the court on a challenge to calculate of mesne profits made in terms of that order.

The learned judge also held:

“After the findings that, the defendants are wrongful occupation on and from May, 1986 attained finality between the parties by virtue of the decree it cannot be said that, the quality or the colour of his possession changed with the appointment of a Special Officer on and from October 20, 1993. Even then as the facts of the case demonstrates the defendant no. 1 continued to remain in possession of the suit premises through the articles that it chose to keep at the suit premises under the actual physical possession of the Special Officer. No attempt was made by the defendant no. 1, to surrender the tenancy. No attempt was made by the defendant no. 1 to have the order appointing the Special Officer recalled or to take possession of the suit premises or to remove its possession from the suit property. It continued to stake its claim for possession for the entirety of the period.”

The suit was decreed in terms of this report of the special referee as marginally modified by the judgement and order dated 11th August, 2014.

Hence this appeal.

ARGUMENTS:

While arguing the appeal Mr. Utpal Bose learned Senior Advocate assisted by Mr. Mukherjee tried to convince the court that the determination of mesne profits by the special referee for the period when the special officer was in possession of the property, was open to challenge before us. Learned counsel tried to argue that the entire period from the date of the decree till handing over the possession of the property to the respondents was before the Special Referee for calculation of mesne profit. The occupation of the special officer was for part of this period. Whether for this period the respondents would get mesne profits was subject to determination also. This suit could never be barred by any principle of res judicata which principle was being urged by the respondents to contend that since the

court has held that the appellant was in wrongful possession of the property from May, 1986 till its delivery to the respondents, they were entitled to mesne profits for the entire period.

Learned counsel argued that under Section 2(12) of the Civil Procedure Code the basis of calculation was the profit which a person in wrongful possession of the property would have or with reasonable diligence have earned for the period of such occupation. Since, the appellant was not in physical possession during the occupation of the receiver it could not be said that they could have earned mesne profits. Therefore, for the said period of the occupation of the special officer, the respondents were not entitled to any mesne profits.

Learned counsel placed Order XX rule 12 of the Code of Civil Procedure which as follows:

“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 direction and 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.”

He argued that where the suit was for recovery of possession of immovable property and for mesne profits the court could pass a decree for mesne profits or direct an enquiry to ascertain it from the institution of the suit till, inter alia, the delivery of possession to the decree holder. He said that the decree which had been passed on 15th July, 2013 was only a preliminary decree and that a final decree would only follow after such an enquiry was made by the court, and in this case, by this court through this special referee under Order XX Rule 12 sub-rule 2. Mr. Bose cited the following paragraphs in **Chittoori Subbanna Vs. Kudappa Subbanna & Ors.** reported in **AIR 1965 SC 1325**:

24. The decrees have been so construed not on account of the vagueness of the expressions used for decreeing mesne profits or directing the inquiry about mesne profits but on account of the fact that the decree for future mesne profits or directing enquiry about them is not based on the decision of any controversy between the parties but is made in the exercise of the discretionary power vested in the Courts by the provisions of Order 20 Rule 12 (1) (c) C.P.C. The Court is deemed to exercise the power in accordance with law and therefore a decree which decrees or directs enquiry about mesne profits for the period of dispossession or until delivery of possession is construed as a decree for mesne profits for a period of three years from the date of the decree if possession is not delivered within that period. This power was given to the Court in order to avoid multiplicity of suits between the decree-holder and the judgment-debtor for mesne profits which the decree-holder could rightly claim. The period was, however, restricted to three years in order to discourage decree-holders from making delays in

taking possession. If a decree-holder be not diligent in executing the decree, he would have to forego mesne profits for the period in excess of three years or would have to institute separate suits to recover them. The Privy Council did not pass its order in Girish Chund- Case(1) on the basis of the decree being vague or incomplete. It simply held that the decree for a period in excess of three years was not authorized by Section 211 of the Code of Civil Procedure of 1882.

27. The preliminary decree directed an inquiry about the mesne profits from the date of the institution of the suit up to the date of delivery of possession to the decree-holder. The decree-holder could not have felt aggrieved against this order. The judgment debtor could not have insisted for detailing all the various alternatives mentioned in Order 20 Rule 12 (1) (c) and he could not have expected that possession would not be taken within three years of the decree. The direction about the enquiry with respect to future mesne profits does not amount to an adjudication and certainly does not amount to an adjudication of any controversy between the parties in the suit. It has no reference to any cause of action which had arisen in favour of the plaintiff-decree holder before the institution of the suit. The direction was given on account of a special power given to the Court under Order 20 Rule 12 (1) (c) of the Code to make such a direction if it considered it fit to do so. It was within the discretion of the Court to make the direction or not. The Court does not decide, when making such a direction, the period for which the decree-holder would be entitled to get mesne profits. No such point can be raised before it. The judgment debtor's liability to mesne profits arose under the ordinary law and a suit for realizing mesne profits could be separately filed, by the decreeholder. The provisions of Order 20 Rule 12 (1) (c), are just to avoid multiplicity of suits with consequent harassment to the parties. The mere fact that the direction for an enquiry into mesne profits is contained in a preliminary decree does not make it such a part of 'the decree against which alone appeal could have been filed. The appeal could be filed only after a

final decree is passed decreeing certain amount for mesne profits to the decree-holder. It follows that the question about the proper period for which mesne profits was to be decreed really comes up for decision at the time of passing the final decree by which time the parties in the suit would be in a position to know the exact period for which future mesne profits could be decreed in view of the provisions of Order 20 Rule 12(1)(c)..

28. The direction in the preliminary decree cannot operate, in terms of Section 11 C.P.C. or on general principles, as res judicata for the simple reason, as stated earlier, that the direction is not based on the decision of any matter in controversy between the parties and is given in the exercise of the power vested in the Court under Order 20 Rule 12 (1) (c). Again, for similar reasons, the principle that a Court can decide a question within its jurisdiction wrongly as well as rightly and, if the decision said to be wrong had become final, the Courts have to respect it, will not apply to these cases.”

The order for enquiry into mesne profits is a preliminary decree. At that point of time, the court does not decide the period for which the decree holder would be entitled to get mesne profits. The proper period of calculation for mesne profit would be known after the final decree. An appeal could only be filed after a final decree. The preliminary decree could not operate as res judicata, Mr. Bose argued.

Two cases, decided closely in points of time were cited Mr. Bose. One **Dwijendra Narain Roy Vs. Joges Chandra De & Ors.** reported in **AIR 1924 Cal 600** decided on 31st December, 1923 and the other **Chhaganmull Agarwalla & Ors. Vs. Amanathila Mohammad Prodhan & Anr.** reported in **1924 Cal 1010** decided on 31st March, 1924. It does not appear that the former case was cited in the later litigation. The ratio laid down by the Division Benches of this court in those matters is that where a property is in the possession of a receiver, it is held for the benefit of the litigant who would be ultimately successful. The appellant could not said to

be in wrongful possession thereof. It would not be liable in mesne profits for the period it was in the actual physical possession of the receiver.

A later division bench of this court had occasion to consider the matter once again in **Gokul Chandra Seal Vs. Atlas and Union Jute Press Ltd.** reported in **AIR 1986 Cal 393** where one of the two above decisions **Chhaganmull Agarwalla & Ors. Vs. Amanathila Mohammad Prodhan & Anr.** reported in **1924 Cal 1010** was cited. This division bench also affirmed its earlier decisions on this issue.

Mr. Jishnu Saha, learned Senior Advocate assisted by Ms. Mukherjee for the respondents very strongly relied on the passage in the judgment and decree dated 15th July, 2013, to the following effect:

“Since the defendants are in wrongful occupation of the suit premises since 1986, the plaintiffs shall be entitled to mesne profits from May 1986 till recovery of possession and Mr. Samrat Sen, a member of the bar, is appointed as special officer to compute the mesne profits and submit the report before this Court within a period of eight weeks from date of communication of this order.

Mr. Sarkar, learned counsel for defendants, prayed for stay of operation of the judgment and decree. The same is considered and rejected.”

which was affirmed by the appellate court on 5th December, 2013. Subsequently the special leave petition was also dismissed. Learned counsel contended that the finding of the court that the appellant was in wrongful occupation of the suit premises since 1986 had become final and binding. Furthermore, the finding that the respondents would on that basis be entitled to mesne profits from May, 1986 till recovery of possession had also become final and binding. Therefore, mesne profit had to be calculated on the footing that the appellant was in wrongful occupation of the

premises. Having made calculation of mesne profit on that basis it could not said that the report of the said special officer was flawed.

The next point urged by learned counsel was that the said judgment and decree dated 15th July, 2013 was to be taken as a preliminary decree. An appeal from preliminary decree was preferred. In that appeal the point that the appellant now urges that the period of possession of the premises by the special officer is to be excluded in the calculation of mesne profit was not taken. The appeal was argued on other points and decided accordingly. The appeal was dismissed resulting in affirmation of the decree. Learned counsel placed Section 97 of the Code of Civil Procedure to submit that if a party did not appeal against a preliminary decree he could not challenge it in any appeal from the final decree. Hence the appellant was estopped from challenging the finding in the said decree about wrongfulness of the appellant's possession or the entitlement of the respondents to mesne profits.

DISCUSSION

On scrutiny of the judgment and decree dated 15th July, 2013 made by the trial court it appears that only the following issues were raised and argued before it and decided. The first was whether by a scheme of merger, amalgamation etc., of the lessee/tenant Standard Pharmaceutical Ltd. with the appellant, the latter could be inducted as a tenant, without the consent of the respondent/landlords? The second: Whether such induction of the appellant would amount to illegal transfer of the lease/tenancy? Thirdly: If the lessee/tenant parted with possession of the property in the above manner could the status of the appellant be that of a trespasser?" In that case what reliefs were the respondents entitled to?

The learned judge decided all the issues in favour of the respondents by holding that a tenancy could not be created by amalgamation merger of companies without the consent of the landlords. Hence, there was illegal transfer of the demised premises by the lessee/tenant in favour of the

appellant, which made the latter a trespasser and liable to eviction. Having held so, the learned judge opined that the occupation of the appellant was wrongful and that the respondents were entitled to mesne profits from May, 1986 till possession was delivered back to them.

The Supreme Court dictum in **Chittoori Subbanna vs. Kudappa Subbanna and Ors.** reported in **AIR 1965 SC 1325** was very strongly relied upon by learned counsel for the appellant, Mr. Bose. He argued that the issue of mesne profits had not become res judicata, with the decree because when the court ordered enquiry into mesne profits under Order XX Rule 12 of the Civil Procedure Code for the period post decree, then that issue was not one of the issues in the suit. It was a “matter in controversy in future” involving a period of three years’ wrongful occupation of the appellant post decree or till eviction whichever was earlier. Hence, the preliminary decree directing eviction and enquiry into mesne profits did not become res judicata.

We all know that a ratio would not be applicable to the different facts of another case. If the mere method of computation and the amount of mesne profits were the subject matter of dispute then unquestionably the ratio of the Supreme Court case would have applied. Here, the argument that is advanced is whether the appellant would be liable to mesne profits for a particular period of time that the property was in the physical possession of the Receiver. It is said that since the property was in the physical possession of the Receiver from 20th October, 1993 till 24th April, 2014, it could not be in the wrongful possession of the appellant which was an essential fact which had to exist for their liability in mesne profits. The judgment and decree of the first court dated 15th July, 2013 had categorically declared the possession of the appellant to be wrongful and directed calculation of mesne profits by the Special Referee for a specific period including the period of physical possession by the special officer. This finding was not challenged before the appellate court here, nor before

the Supreme Court. It has become final and binding. Therefore, it could not be said that it was a controversy which arose in future at the time of determination of mesne profits as was the situation in the case decided by the Supreme Court in **Chittoori Subbanna vs. Kudappa Subbanna and Ors.** This issue had become squarely res judicata between the parties, in my opinion.

This principle also finds recognition in Section 97 of the Code of Civil Procedure, 1908. It provides that where any party aggrieved by a preliminary decree does not appeal from it, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

In this case, the findings of the learned single judge that the appellant was in wrongful possession of the property and that the respondents were entitled to mesne profit from May, 1986 till they got delivery of possession of the property was not even challenged before the appellate court. In fact, the memorandum of appeal preferred from this preliminary decree did not take this ground at all. Neither was this taken before the Supreme Court in the special leave petition. Therefore, it could be said that the appellant did not appeal from that part of the preliminary decree. Not having appealed from that part of the decree, in my opinion, they cannot be allowed to take this point when the final decree has been passed on the basis of assessment of mesne profits considering the premises to be in the wrongful possession of the appellant.

Mesne profits is defined in Section 2(12) of the Civil Procedure Code, 1908 as follows:-

“2. (12). *“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.*”

It is not the profit which the owner of the property actually earned or would reasonably have earned from use of the property. It is measured in terms of what a person in wrongful occupation of the property earned or would with ordinary diligence have earned from the property.

The judgements of our court **in Dwijendra Narain Roy vs. Joges Chandra De and Ors.** reported in **AIR 1924 Cal 600**, **Chhagmull Agarwalla Vs. Amanatulla Mahammad Prodhan** reported in **AIR 1924 CAL 1010** followed and affirmed in **AIR 1986 Cal 393**, have made it explicit that possession of an immovable property by the receiver is custody and possession by the court. The receiver on behalf of the court holds the property as trustee for and for the benefit of the party found entitled to it on final adjudication of the case. Hence while the property is in the possession of the receiver appointed by this Court, it can never be said that it is in the wrongful possession of the defendant.

In our case, there is a specific finding of fact which is uncontroverted that the defendant was in wrongful possession of the premises during the period it was in the possession of the special officer.

Hence, the ratio of the above decisions would be inapplicable.

For those reasons, this appeal fails. It is hereby dismissed. The impugned judgment and decree is affirmed. Any pending connected application is disposed of accordingly.

No order as to costs.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree,

(MD. NIZAMUDDIN, J.)

(I. P. MUKERJI, J.)