

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE

APOT 4 of 2023
 With
 C.S. 77 of 1995
 G.A.1 of 2023

Sudera Realty Pvt. Ltd
vs.
Indian Oil Corporation Ltd.

BEFORE:

The Hon'ble Justice Soumen Sen,
 The Hon'ble Justice Uday Kumar
 Date: 22nd February, 2023.

Appearance:
 Mr. Jishnu Saha, Sr. Adv.
 Mr. U.S. Menon, Adv.
 Ms. Sulagna Mukherjee, Adv.
 Mr. Abhirup Chakraborty, Adv.
 for the appellant

Mr. Tilak Kumar Bose, Sr. Adv.
 Mr. Dhruba Ghosh, Sr. Adv.
 Ms. Vineeta Meharia, Adv.
 Mr. Amit Meharia, Adv.
 Mr. Kanishk Kejriwal, Adv.
 Ms. Madhurima Halder, Adv.
 Ms. Paramita Banerjee, Adv.
 Ms. Amrita Das, Adv.
 for the respondent

Soumen Sen, J.: By consent of the parties the appeal and the application are treated on the day's list and disposed of by this common order.

The appeal is arising out of an order passed by Justice Sugato Majumdar on 19th December, 2022 in an application filed for judgment upon admission.

The learned Single Judge as an ad-interim measure directed the respondent to deposit an amount calculated at the rate of Rs.10/- per Sq. Ft. with the learned Registrar Original Side within a specified period and the Registrar Original Side was directed to invest the said amount in a fixed deposits account with a nationalized bank until further order.

This order is under challenge.

Mr. Jishnu Saha learned Sr. Advocate representing the appellant has submitted that in view of the fact that the respondent in its written objection to the report filed by the special referee in paragraph 9 has stated that the ground rent/occupational charges can be at best Rs.10/- to 15/- per Sq. Ft. per month, the learned Single Judge instead of directing the respondent to deposit an amount calculated at Rs.10/- per Sq. Ft. should have directed the said payment to be made in favour of the appellant.

Mr. Saha submits that the entitlement of the appellant to receive the said amount is undisputed and even if it is held that the appellant is not entitled to receive Rs.60/- per Sq. Ft. as determined by the special referee the respondent having admitted before the special referee that the ground rent would be between Rs.10/- and 15/- could not have opposed the prayer for payment of mesne profits @ Rs.10 per sq. ft. subject to the final adjudication of the dispute.

Mr. Dhruva Ghosh learned Senior Counsel lead by Mr. Tilak Kumar Bose, Sr. Advocate has submitted that the determination of mesne profit is still pending and unless it is finally decided and adjudicated upon by the

learned Single Judge the appellant cannot claim payment at this stage. It is submitted that the impugned order is not appealable under Clause 15 of the letters patent as there is not finality attached to the said order.

Mr. Ghosh in this regard, has relied upon the decision of the Hon'ble Supreme Court in ***Shyam Sel & Power Ltd. & Anr., v. Shyam Steel Industries Ltd.***, reported in **2023(1) SCC 634** paragraphs 19 to 28.

Mr. Tilak Kumar Ghosh the learned Senior Counsel supplementing the aforesaid submission has submitted that the object and purpose of the said order was to test the bona fide and capacity of the respondent to pay the aforesaid sum in the event the matter is finally decided by the learned Single Judge in favour of the appellant. The appellant having not accepted the amount suggested by the respondent towards mesne profit cannot claim the said amount by way of an interim relief. Mr. Bose has relied upon the full bench decision of the Allahabad High Court in ***Ashutosh Shrotriya & Ors. v. Vice Chancellor Dr. B.R. Ambedkar University & Ors.***, reported in **2015 SCC Online All 8553; AIR 2015 All 187 (FB)** for the proposition that orders which do not have the trapping of finality cannot be considered as judgment under Clause 15 of the Letters Patent.

Mr. Bose has drawn our attention to the order dated 18th January, 2023 and 16th February, 2023 passed by the learned Single Judge in the pending proceeding and submits that by reason of adjournment at the instance of the appellant the application could not be finally heard.

The appeal before us has reminded us of the oft quoted observation of the privy council in ***General Manager of the Raj Durbhunga v. Coomar Ramaput Sing*** reported in **1872 SCC Online PC 16** in which it was observed that the actual difficulties of a litigant in India begin when he has obtained a decree.

The appellant's hurriedly approaching this court was only to demonstrate its anxiety that the decree holder has been suffering in not receiving his admitted entitlement towards mesne profits. In a suit for eviction filed by the appellant in 1995 the decree passed by the Learned Single Judge on 25th September, 2014 with some modification was upheld by the appellate court on 14th December, 2018 and thereafter upheld by the Hon'ble Supreme Court on 6th September, 2022. The surrender of possession by the respondent is only a partial satisfaction of the said decree. The monetary claim for unauthorised and illegal occupation for the fourth floor from 4th November, 1991 till 31st May, 1994 and second and third floor from 17th September, 1990 till 31st May, 1994 would be substantial even going by the affidavit filed by the respondent in the connected proceeding. The right to receive money is a valuable right and if such right is denied it cannot be said that denial of such right is a mere inconvenience.

The judgement cited by Mr. Ghosh and Mr. Bose would show that the nature of the orders were such which could not have been considered as judgement as the said orders did not finally adjudicated the issue between the parties. The question of appealability of an order would depend upon the nature of the order. Even in *Shyam Sel* (supra) it was observed that the

Division Bench did not give any reason as to how the discretion exercised by the learned judge was exercised arbitrarily, capriciously or perversely. [See. paragraphs 37 and 38 of **Shyam Sel** (*supra*)].

An order refusing to appoint a receiver or refused to pass an ad-interim injunction are “judgments” within the meaning of Clause 15 of the Letters Patent. [See. Paragraph 19 of **Shyam Sel** (*supra*) and paragraphs 23 & 30 in **Asutosh** (*supra*)].

If a court directs filing of an affidavit after recording that the party applying for the interim relief has failed to establish the trinity test is an appealable order. Moreover, the order impugned is not of procedural in nature. It is neither a routine order. However, we are not seized with any such problem. Here the matter is simple.

The learned Single Judge has taken a *prima facie* view and has not finally adjudicated the issue. The respondent is entitled to an opportunity to make it stand clear in the affidavit in opposition which has since been filed but the matter could not be finally heard and decided since the appeal is pending.

The learned Single Judge has also expressed his anguish for the delay caused in the execution proceeding. The nature of the order that the appellant is presently seeking would be final in nature and the learned Single Judge in our view has adequately secured the claim of the appellant till the matter is finally adjudicated upon in the said proceeding.

It is true that it might result in some delay in realization of its claim towards mesne profits but the matter is required to be heard and decided finally. The impugned order in effect has allowed prayer (b) of the notice of motion which reads:

“B. An order directing such payment of Rs.11,56,03,456/- to be treated as a condition precedent for considering the defendant’s affidavit in opposition filed in G.A. No.9 of 2019 by this Hon’ble Court”.

Prima facie it appears that the claim of mesne profits at least to the extent of Rs.10/- is unassailable in view of paragraph 9 of the written objection in G.A. NO.9 of 2019 and the nature of the evidence adduced by the respondent before the Special Referee. Admission is the best piece of evidence. However, this observation shall not influence the ultimate decision.

In the event, the adjudication of the exception to the determination of mesne profits by the special referee requires longer time, the learned Single Judge may on the returnable date subject to His Lordship’s convenience decide the limited issue of judgment upon admission on consideration of the quality of the defence raised in the affidavit in opposition to the said application and dispose of the application for judgment upon admission as per convenience uninfluenced by the observation made in this order before finally deciding the application taking exception to the report filed by the respondent. There is no legal bar in allowing a part of the claim based on admission and the disputed part can be decided later.

The discretion exercised by Justice Majumdar is well founded and does not call for any interference.

The appeal and the applications are accordingly disposed of with the aforesaid observation.

I agree

(Soumen Sen, J.)

(Uday Kumar, J.)