

OD-1

ORDER SHEET

APDT/7/2022
With
CS/322/2012
IA No. GA/1/2022, GA/2/2022

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

UNION OF INDIA REPRESENTED BY ASSISTANT COMMISSIONER OF
CENTRAL EXCISE (KOL-III, DIV.)
-VS-
P. G. AND SAWOO PVT. LTD.

BEFORE :

THE HON'BLE JUSTICE HARISH TANDON
And
THE HON'BLE JUSTICE PRASENJIT BISWAS

Date : January 5, 2023.

Appearance:
Mr. K. K. Maiti, Adv.
Mr. Tapan Bhanja, Adv.
...for the appellant.

Mr. Surojit Nath Mitra, Sr. Adv.
Mr. Suchayan Banerjee, Adv.
Mr. Sayak Mitra, Adv.
...for the respondent.

The Court : Though there is a considerable delay in filing the instant appeal which not only would be evident from the report of the department but from the averment made in the application for condonation of delay, yet we invited the parties to address us on the merit of the said appeal bearing in mind that the Court must encourage the adjudication on merit rather than dismissing on technical grounds. The meritorious matter should not be dismissed on the anvil of the litigant approaching the Court belatedly, more particularly, when the delay is attributable in respect of the Union of India although they are not privileged litigant. The procedural hazards sometimes

impede the prompt decision. Be that as it may, we decided to hear out the appeal itself as the same can be conveniently disposed of without calling for the records or inviting the paper book to be filed as the decree challenging the instant appeal is passed ex parte.

Admittedly, the defendant who chose to file the appeal cannot put his defence and has to restrict his argument on the basis of the averment made in the plaint and the evidence laid in this regard.

It is strangely submitted by the learned advocate for the appellant that the moment the Apex Court did not interfere with the interlocutory order passed by the Division Bench as well as the Single Bench in the suit, subsequent amendment carried out in the pleading cannot be looked into nor any decree can be passed thereupon. To understand the aforesaid point, it is necessary to adumbrate the salient factors which are more or less undisputed.

The appellant entered into a lease agreement for enjoyment and occupation of the demise premises for a specified time which expired by efflux of time in the year 2010. The suit was instituted in the year 2012 being CS/322/2012 for recovery of possession and the mesne profit/damages for wrongful and illegal occupation of the appellant thereat. Pending the aforesaid suit, negotiations were held and it appears that the parties agreed to enter into a fresh lease agreement from a prospective date for a further period. Yet the suit being CS/322/2012 remained pending since the parties subsequently entered into a fresh lease agreement, the interregnum period between the expiry of lease by efflux of time and the date of the fresh agreement, the suit was intended to be continued at the behest of the respondent. In course of the said suit, an application was taken out by the respondent for a direction upon the appellant herein to pay a sum of Rs.39,79,673/- towards the interest

calculated at the rate of 18 percent in terms of the averment made in paragraph 42 of the said petition. The said application was taken up by the Single Bench on 15th July, 2015 and ultimately dismissed the same as such relief cannot be decided on affidavit evidence. It was thus observed:

“At the time of entering into a fresh lease agreement, it was open for the plaintiff to insist for payment of interest on the arrears as a condition precedent for entering into the fresh lease agreement. Now that a fresh lease agreement has been entered into, it would be difficult for the plaintiff at this stage to claim the arrears unless it is established at the trial that such payment was received belatedly reserving the right to claim interest for the delayed period. Moreover, the plaintiff would be required to establish that the plaintiff is entitled to claim interest @ 18% per annum.”

The said order was assailed before the Division Bench in APOT/424/2015 and the Division Bench while dismissing the appeal observed that the moment the issue of entitlement of the interest on arrears of rent is involved, the same is required to be decided and another question that would be clinching an issue would be the rate of interest. The matter travelled to the Supreme Court and while dismissing the Special Writ Petition, the Apex Court observed as such:

“However, if the issue with regard to the entitlement for interest on the arrears of rent has not yet been framed, the concerned Court is directed to take up the same and dispose of the suit as expeditiously as possible, preferably, within a period of six months from today.”

What is discerned from the aforesaid observation made in the judicial order is that the claim of an interest that too at the rate of 18 percent per annum cannot be decided without any evidence to be laid in this regard and

the Apex Court have highlighted that in absence of any issue to be framed in this regard, it would not be proper to pass such direction. The aforesaid observation can never be construed to have put any fetter over the claim of the interest at the rate of 18 percent but what has been held therein that such an issue unless framed in the suit cannot be decided without any evidence to be led thereupon.

Such being the intention culled out from the aforesaid order, the respondent thereafter applied for an amendment of the plaint seeking to incorporate the relief in the form of an interest which was eventually allowed. The appellant did not challenge the order permitting the amendment to be carried out in the plaint. However, they chose to remain absent and did not contest the suit. Astonishingly, learned advocate for the appellant submits that the moment Supreme Court has used the expression 'suit' it must be construed as an un-amended suit and not the amended suit. Such misunderstanding of the tenet of the order of the Supreme Court is laudable as it is beyond any doubt that the expression 'suit' includes the suit with the amendment, if carried out subsequently, as the amendment, if allowed, relates back to the date of the institution of the suit unless the Court expressly indicated not to be so. The doctrine of relation back is the uniform rule in the case of amendment unless interdicted by an order of the Court. We have no hesitation in our mind that the word 'suit' contained in the order of the Supreme Court cannot be given a restrictive meaning as it would go against the spirit of the law relating to the amendment of the pleading. It is also beyond cavil of doubt that the judgment delivered by the Court should not be construed as a statute nor the interpretive process applicable to the statutory interpretation should be applicable thereto. We do not find that such

misconception in the mind of the learned advocate for the appellant stands as an obstacle in upholding that the suit would mean the suit as it stands on the date of the passing of the final decree and if any amendment having been carried out, it would be regarded as a pleading in the suit and, therefore, we do not find any merit in the aforesaid contention.

The learned advocate for the appellant intended to bring several facts which at best can be said to be a pleading available by way of defence. This is an appeal against the ex parte decree and, therefore, the defendant appellant cannot put anything beyond record but have to travel within the peripheral of the plaint, the evidence adduced in respect thereto and cannot be allowed to bring the foreign elements.

We find that by virtue of an amendment, the relief in this regard was incorporated and the trial Court finds that the plaintiff/respondent has been able to prove such claim and, in fact, granted relief in their favour which cannot be said to be *per se* illegal nor beyond the scope of the suit.

We, thus, do not find any merit in the instant appeal. However, we find that the purpose of filing such belated appeal is to secure the delay in disposal of the execution proceeding and for that we feel that it is a fit case where we should impose costs.

Accordingly, the appeal is dismissed with costs assessed at Rs. 1 lakh.

(HARISH TANDON, J.)

(PRASENJIT BISWAS, J.)