IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

Present:
The Hon'ble Justice Sugato Majumdar

CS/300/2000
DEBJYOTI BASU AND ORS.
VERSUS
BHARTIA ELECTRIC STEEL CO. LTD. & ORS.

For the Plaintiff	:	Mr. Dhruba Ghosh, Sr. Advocate, Mr. Chandan Kumar Lal, Advocate, Ms. Ajeeya Chowdhury, Advocate.
Hearing concluded on	:	28.06.2023
Judgment on	**:**	**12.07.2023**

Sugato Majumdar, J.:

The instant suit was filed by the original Plaintiff praying for mesne profit, damages along with other prayers.

The plaint case, in nutshell, is that the suit property being the flat no. 14C, located on the 14thfloor of the multistoried building situated at 10 Lord Sinha Road, Kolkata – 700071 was let out to the Defendant no. 1 M/s. Bharatia Electric Steel Company Limited for residential purpose of the executives of the company. The tenancy was initially for a period of three years beginning from 01/08/1977. Initially rent was fixed at Rs.1000/- per month and Rs.600/- towards hiring charges of fittings, fixtures as well as towards service charges. It was represented to the original Plaintiff by the Defendant no. 1 that the flat would be used for occupation of one of its manger T. R. Desai. In terms of the letters dated 26/07/1985 and 30/07/1985, the Defendant no. 1 informed the original Plaintiff that in case, the said Mr. T. R. Desai leaves the job of the company then tenancy would be surrendered and vacant possession would be handed over.

Tenancy was extended from time to time and it was last extended upto 31/08/1986. Rent was enhanced to Rs.2000/- per month along with service charges at a rate of Rs.1000/- per month with effect from 01/08/1985.

After 31/08/1986, tenancy was not renewed. The Defendant no. 1 also neglected and failed to pay rent thereafter. In the year 1990, the said T. R. Desai left the service of the Defendant no. 1, but the Defendant no. 1 neglected and failed to hand over the vacant possession to the original Plaintiff. Thereafter the original Plaintiff filed a suit for eviction against the Defendant no. 1 in the City Civil Court of Calcutta. The said suit was registered as Ejectment Suit No. 348 of 1991. The said T. R. Desai filed an application in the said suit under Order I Rule 10 (2) of the Code of Civil Procedure, 1908 but the petition was rejected. The Ejectment Suit No. 348 of 1991 was decreed ex-parte against the Defendant no. 1 on 07/01/1994.

The original Plaintiff, on the Ejectment Suit No. 348 of 1991 being decreed, drawn up execution proceeding numbered as Ejectment Execution Case No. 44 of 1994. In that proceeding the Defendant no. 2, being one of the legal heirs of the said T. R. Desai filed an application under Order XXI Rule 97/100/101/103 of the Code of Civil Procedure, 1908 which was numbered as Miscellaneous Case No. 1104 of 1994 (Samir Desai vs. Buddhadeb Bose & Ors.). Another application filed for stay of the execution petition was rejected. The Defendant no. 2 moved to this Court on being aggrieved by such rejection of stay application. This Court directed the Trial Court to dispose of the proceeding within two months. Thereafter the Miscellaneous Case No. 1104 of 1994 was converted into Title Suit No. 3940 of 1995 by the Trial Court. The Defendant no. 3 & 4 applied to be made a party in that suit but the same was rejected.

The original Plaintiff moved before this Court in C.O. 3203 of 1998 against conversion of the Miscellaneous Case No. 1104 of 1994 to Title Suit No. 3940 of 1995. This Court set aside the Order of conversion and directed the Miscellaneous Case No. 1104 of 1994 to be disposed of. This Miscellaneous Case No. 1104 of 1994 was ultimately dismissed for default.

In the meantime the Defendant no. 3 & 4 filed another suit registered as Title Suit No. 177 of 1999 challenging the decree passed in the Ejectment Suit No. 348 of 1991 and also praying for declaration of their legal status as tenant. An application for ad interim order of injunction was moved and order of status quo was granted. Subsequently the order was vacated against which an appeal was preferred in this Court which was also dismissed.

Miscellaneous Case No. 1104 of 1994 which was dismissed for default was restored subsequently but this time the Defendant no. 3 & 4 filed an application under Order XXI Rule 97/100/101/103 of the Code of Civil Procedure, 1908 which was registered as Miscellaneous Case No. 6194 of 1999. This was also dismissed as barred by the principle of *res judicata* in view of the judgment passed in Miscellaneous Case No. 1104 of 1994. This dismissal order was passed on 14/01/2000. Earlier Miscellaneous Case No. 1104 of 1994 was dismissed by an order dated 08/10/1999 observing that the decree passed in Ejectment Suit No. 348 of 1994 was binding upon the Defendant No. 2 and his family members.

Subsequently, the original Plaintiff proceeded with the Ejectment Execution Case No. 44 of 1994 and the Defendant no. 2 preferred appeal against the order of rejection of the Miscellaneous Case No. 1104 of 1994 in this Court. The said appeal was registered as F.M.A.T. 4163 of 1999. In the said appeal, in terms of the order dated 10th/11th April 2000, the Division Bench directed the Defendant no. 2, the Appellant therein, to vacate the premises within six months; directed also to file an undertaking to vacate the premises on behalf of all the family members; to vacate the flat within that time and also to pay occupational charges, till handing over possession, at a rate of Rs.12000/- per month.

The original Plaintiff also filed a money suit in the City Civil Court at Calcutta claiming mesne profit for a period of three years from the months of February 1994 to January 1997 against the Defendant no. 1. The suit was decreed ex parte.

In the present suit the original Plaintiff claimed for mesne profit from the month of April 1997 to May 1997 along with damages.

The Defendants contested the suit by filing separate written statements.

Defendant no.1, in the written statement, refuted the allegations leveled against it. It is contended in the written statement that in the previously decided ejectment suit the Plaintiff had not prayed for any enquiring into damages and/or mesne profits. The original Plaintiff did not seek any leave of the Court under Order II Rule 2 of the Code of Civil Procedure, 1908. Thereafter, the original Plaintiff filed Money Suit No. 63 of 1997. The original Plaintiff sought to recover mesne profit in that suit from the month of January 1994 to the month of January 1997. It was open to the original Plaintiff to claim relief of mesne profit till recovery of possession. Although in the said money suit a prayer was made for leave under Order II Rule 2 of the Code of Civil Procedure 1908, the decree dated 22/11/2000 only granted relief of mesne profit without allowing the prayer made under Order II Rule 2 of the Code of Civil Procedure, 1908. Therefore, the instant suit is barred.

It is also contended in the written statement filed by the Defendant no. 1 that the present suit is collusive between the original Plaintiff and the Defendant no. 2 – 4. The suit is not maintainable against the Defendant no. 1.

It is further case of the Defendant no. 1 that the later surrendered the tenancy in terms of a letter dated 18/12/1989 to the original Plaintiff. Thereafter, the original Plaintiff entered into an arrangement with the said T. R. Desai. Therefore, in absence of T. R. Desai, the Defendant no. 2 – 4 are liable to pay occupational charges and mesne profit.

It is further stated that the original Plaintiff got the decree of eviction against the present Defendant no. 1 on 07/01/1997, whereas they averred in the plaint that the present Defendant no. 1 is liable to pay rent from June 1986 till the date of institution of the suit. This is tantamount to admitting that the present Defendant no. 1 is a tenant even after the decree of eviction. The Defendant no. 1 paid rent from June 1986 till 18/10/1989. After that, since the tenancy was surrendered, the Defendant no. 1 is not liable to pay any rent.

The Defendant no. 2 – 4 filed separate written statement, contending therein that the tenancy was through the Defendant no. 1. It is admitted that even after retirement of the said T. R. Desai, he continued to live in the suit property till his death. After death of the said T. R. Desai, his legal heirs being the Defendant no. 2 –

4 continued to live in the suit property till 10/10/2000. The Defendant no. 2 – 4 duly paid service charges during their occupancy of the suit property.

The Defendant no. 2 – 4 admitted the litigations which were pending between the parties. It is further contention that the Defendant no. 2 – 4 tendered cheque, drawn up by the Defendant no. 4 towards payment of occupational charges as directed by the Division Bench, for a sum of Rs.12,000/- but the Plaintiff refused to accept the same. The Defendant no. 2 – 4 handed over possession of the suit premises to the Special Officer appointed by the Division Bench on 10/10/2000.

It is further contended that mesne profit and occupational charges were claimed at Rs. 20,000/- per month in March 1997. Then, in any manner, the same cannot be double of the amount from the very next months. In nutshell, the Defendant no. 2 – 4 denied that the original Plaintiff was entitled to the relief claimed.

During Pendency of the suit the original Plaintiff expired. His legal heirs were substituted and the cause title was amended. Similarly on death of the Defendant no. 4, her name was struck out. As because her legal heirs had already been made party, no substitution was made.

On the basis of the pleadings of the parties, the following issues were framed:-

1. Is the suit of the Plaintiff hit or barred by the provisions under Order II Rule 2 of the Code of Civil Procedure, 1908?
2. Is the suit an abuse of the process of Court or collusive as alleged by the first Defendant?
3. Is any mesne profit recoverable from the first Defendant as claimed?

4. Is the claim or any part of it is barred by the laws of limitation?

It is necessary, at this time, the following further issues should be framed namely –

5. Whether the Plaintiff is entitled to the relief prayed for?
6. If so who is liable to pay to the Plaintiff?
7. What other relief/reliefs, the Plaintiff is entitled to?

Both the parties adduced orally as well as documentary evidences. However, the Defendants abstained from appearing at the time of argument.

Defendant No. 1 raised a plea in the written statement that the present claim is barred under Order II Rule 2 of the Code of Civil Procedure, 1908 and barred under the law as because, although the Plaintiff sought for leave of the Court under Order II Rule 2 of the Code of Civil Procedure, 1908 in the previous Money Suit No. 63 of 1997, while disposing of the suit, the Court did not grand that relief.

It is argued by Mr. Ghosh that for the Plaintiff the suit is not barred by provisions of Order II Rule 2 of Civil Procedure Code, 1908 or the principle of *res judicata* or constructive *res judicata*. Every unauthorized occupation in the suit property give rise to a cause of action everyday; everyday's unauthorized occupation give rise to a separate cause of action; it is a continuing one.

The Defendant No. 2, 3 and 4 continued to possess even after the expiry of tenancy, even after passing of the eviction decree in Ejectment Suit No. 348 of 1991. Cause of action is a continuing one in a claim for mesne profit. Everyday's' unauthorized occupation gives rise to a separate claim for mesne profit. The previous suit namely Money Suit No. 63 of 1997 was decreed for payment of mesne profit from the month of January 1993 to January 1997. The present suit is in respect of a mesne profit related to a different period of unauthorized occupation subsequent thereto. Therefore, once a suit is decreed cause of action based on subsequent event and subsequent wrongful period of occupation cannot be said to be barred by the principles of *res judicata* or constructive *res judicata*.

Therefore, issue no. 1 is decided in favour of the Plaintiff.

Issue no. 4 should be taken up at this stage since it is related to the issue of limitation. Period of limitation in respect of mesne profit, under Article 51 of the Limitation Act, 1963, is three years from the date when profits were received. It is submitted by Mr. Ghosh that the Plaintiff instituted the suit on 8th August, 2000, on the basis of judgment and decree dated 10th/11th April, 2000 passed by the Division Bench of this Court. According to Mr. Ghosh the suit is filed while within a period of limitation.

The period in respect of which the present mesne profit is claimed ranges from the month of April 1997 to May 2000. The parties herein were engaged in litigation during this period, even after passing of the ejectment decree and money decree. Finally, the Division Bench of this Court directed the Defendant No. 2 – 4 to vacate the flat in question which finally put an end to all the litigations. Calculating the period of limitation definitely times spent in litigation is exempted under Section 12 of the Limitation Act, 1963. As mentioned above, the Appellate Court decreed and passed order directing the Defendant No. 2 – 4 to hand over the possession after a six months of grace period, to the Plaintiff. This order was passed on 10th/11th April, 2000. Therefore, the suit is not barred by law of limitation. This issue no. 4 also decided in favour of the Plaintiff against the Defendants. Issue no. 2 is whether the suit is abuse of the process of Court or collusive as alleged by Defendant No. 1. The

Defendant No. 1 did not adduce any evidence in the suit. Therefore, this allegation is not proved. This issue also decided, therefore, against the Defendant No. 1.

Issue no. 3, 5, 6 and 7 are taken up together for the sake of convenience. In Money Suit No. 63 of 1997, decree was passed for mesne profit from the period of January 1994 to January 1997. Evidence adduced on behalf of the parties show that the Defendant No. 2 – 4 continued in possession till 10th October, 2000. The Division Bench of this Court directed the Defendant No. 2 – 4 to pay occupational charges during the six months grace period without foreclosing the right of the Plaintiffs to claim mesne profit. As discussed above, the suit is neither barred by limitation nor under Order II Rule 2 of the Civil Procedure Code, 1908 by principle of *res judicata* estoppels or wherever. Therefore, the Plaintiff is entitled to mesne profit.

Mesne profit was awarded at a rate of Rs.20,000/- per month from the month of February 1994toJanuary 1997. It cannot be certainly twice of the amount during the following months. In the notes of argument it is submitted by Mr. Ghosh that it can reasonably fixed at Rs.23,000/- per month by increasing the rate by 15 per cent. Accordingly, mesne profit from the period of April 1997 to May 2000 is fixed at Rs.23,000/- per month with interest at a rate of 10 per cent per annum.

It is in evidence that Defendant No. 2 – 4 continued in possession during the period of suit and it is Defendant No. 2 – 4 who were directed to vacate the premises by the Division Bench of this Court. Therefore, mesne profit along with interest should be payable by the Defendant No. 2 and 3 only since Defendant No. 4 has expired and they are jointly and severally liable to pay the same.

There is a protracted litigation between Defendant No. 2 – 4 and the Plaintiff, Defendant No. 2 initially filed an application under Order XXI Rule 97/100/101/103 of the Code of Civil Procedure, 1908 which was registered as Miscellaneous Case No. 1104 of 1994. This application was subsequently converted in the Title Suit No. 3940 of 1995. Again, under order of this Court conversion of original Miscellaneous Case to Title Suit was set aside and the Title Suit No. 3940 of 1995 was reconverted into Miscellaneous Case No. 1104 of 1994. On this application was made by Defendant no. 1 subsequent applications were also filed by Defendant no. 3 and 4 separately raising same issues. It is clear that the Defendant no. 2 – 4 embarked upon adventurous and protracted litigation to harass the Plaintiff. Multifarious litigations was only to harass the Plaintiff and delaying delivery of possession without any motive to assert positively any right. Therefore the Plaintiff should also get damages which should be Rs.3,00,000/- as reasonable one.

Thus, the Plaintiff shall be entitled to decree of mesne profit from April 1997 till May 2000 at a rate of Rs. 23,000/- per month with interest at a rate of 10 per cent per annum along with damages of Rs.3,00,000/-. Defendant no. 2 & 3 shall be jointly and severally liable to pay the decretal amount to the Plaintiff. In case the decretal amount is not paid to the Plaintiff within a period of three months from the date of decree, the Plaintiff shall be at liberty to draw up execution proceeding against the Defendant no. 2 and 3.

Let the decree be drawn up.

The suit is accordingly disposed of.

(Sugato Majumdar, J.)