

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 598 of 2022

Dilip Kumar Saha

VERSUS

Panchanan Khatua

For the petitioner:

Mr. Partha Pratim Roy, Adv.
Ms. Sudeshna Basu Thakur, Adv.
Ms. Banani Bhattacharya, Adv.
Mr. Sourav Sen, Adv.
Mr. Adrisnata Chakraborty, Adv.

for the opposite party:

Last Heard on: July 12, 2024

Judgment on: July 19, 2024

Biswaroop Chowdhury, J:

The petitioner before this Court is the plaintiff in a suit for eviction and is aggrieved by the order dated 15.12.2021 passed by Learned Civil Judge (Senior Division) in. Title Suit No. 157 of 2016 adjourning the prayer of the petitioner/plaintiff for occupation charges made under Section 151 of the Code of Civil Procedure till final adjudication of the suit. The petitioner being

aggrieved by the order passed by the Learned Trial Judge has come up before this Court under Article 227 of the Constitution of India.

The case of the petitioner/plaintiff before the Learned Trial Court may be summed up thus.

1. The Petitioner instituted suit against the opposite party/defendant before Learned 5th Court of Civil Judge (Senior Division) at Alipore being Title Suit No – 157 of 2016 praying for a decree of eviction against the defendant/opposite party from the suit property, as well as decree for mesne profits.
2. The petitioner pursuant to the institution of the suit filed an application under Section 151 of the Code of Civil Procedure praying for arrear occupational charges since March 2012 @ Rs. 700/- per month and thereafter month by month occupational charges to the tune of Rs. 20,000/- per month for the entire suit property till recovery of Khas Possession.
3. The defendant/opposite party did not file any objection to the petition, but only filed application under Order 7 Rule 11 of the Code of Civil Procedure which was rejected by Learned Court below.
4. On 15.12.2021 Learned Court below was pleased to pass an order on the application for occupation charges filed under Section 151 CPC by observing and directing as follows:

‘Today is fixed for framing of issues and discoveries.

The plaintiff and Defendant are present by filing hazira. Heard the Learned Advocates for the Plaintiff and Defendant.

Let the issues be kept with the case record.

The petition in respect of occupation charges under Section 151 CPC will be considered at the time of final adjudication of the suit.

Fix 10.02.2022 for P.Hearing of the suit.'

The petitioner/plaintiff being aggrieved by the Order dated 15.12.2021 passed by the Learned Trial Court has come up with the instant application.

It is the contention of the petitioner/plaintiff that the Learned Court below failed to apply his judicious mind and passed the impugned order. It is further contended that the impugned order suffers from gross illegalities with material irregularities and is liable to be set aside. It is also contended that the Learned Court below did not go into the merits of the application and simply kept the same pending for trial.

Pursuant to the filing of this application notice was issued upon the opposite party. Opposite Party appeared and contested the case.

Heard Learned Advocate for the petitioner and Learned Advocate for the opposite party. Perused the petition filed and materials on record.

Learned Advocate for the petitioner submits that the Learned Court below erred in not deciding the application for occupation charges. Learned

Advocate further submits that the defendant/opposite party is liable to pay occupation charges for occupying the suit property which is a mesne profit.

Learned Advocate relies upon the following judicial decisions.

Green Band Apartments Private Limited and others.

VS

Mint Matrix and others

Reported in (2021) SCC online Cal-428.

Nripendra Narayan Ghosh.

VS

Dr. Chandra Sekhar Murmu.

Reported in (2017)5 WBLR(Cal)440.

Learned Advocate for the opposite party disputes the submission of the Learned Advocate for the petitioner and relies upon the following decision.

K.K. SAHA and CO. PVT LTD.

VS

ASHOK AGARWAL.

Reported in 2018(1) CHN (CAL) 497.

As the matter in issue involves payment of arrear occupational charge since March 2012 @ Rs. 7000/- per month which was the last occupational charge paid by the defendant/opposite party, and payment of occupational charge to the tune of Rs. 20,000/- current month by month which amounts to awarding mesne profits at the interlocutory stage it is necessary at the very outset to consider the definition of 'mesne profit' and occupation charge.

Section 2(12) of the Code of Civil Procedure defines 'mesne profits' as follows:

“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 the person in wrongful possession’

Although occupation charge is not defined under the Code of Civil Procedure but it can be stated to be some occupation fee to be payable under an occupation agreement by an occupant in respect of the period of occupancy.

Thus from the definition of mesne profits it is clear that when the occupation of the occupant in the suit property will be held to be unlawful the occupant will be liable to pay mesne profit. Such decree for payment of mesne-profit may either be from date of decree till date of recovery of suit property or it may be from date of institution of suit till recovery of suit property.

So far occupation charges are concerned the occupant who has taken the property under occupation agreement whether under lease or, license or tenancy has obligation to pay the occupation charges as agreed in the occupation agreement or otherwise. The occupant of a property may claim to be lawfully occupying the suit property in an eviction suit but he cannot be exempted from paying the agreed occupation charges during pendency of the suit. Different Rent Control Legislations provide for payment/deposit of monthly rent during pendency of eviction suit thus even if the occupation of an occupant does not fall under any of such legislations but the principles and objects may be applied while deciding eviction suit, with regard to deposit of rent/occupation charges. An occupant whose agreement to occupy the suit property has come to an end by efflux of time or by act parties may be liable to pay mesne-profits after eviction decree is passed against him but so far agreed occupation charge is concerned he is liable to pay the same during pendency of the suit.

Now the question which comes for consideration is whether the occupant/defendant is liable to pay mesne profits at the interlocutory stage. In order to decide such issue it is necessary to consider some judicial pronouncements.

In the case of **Green Band Apartments Private Limited and others** (supra) Hon'ble Single Bench of this Court observed as follows:

'11. I have considered the rival contention of the parties. In the decision of the Delhi High Court in the matter of S.S. Puri (supra) it was held as follows:-

"13. The combined effect of Order 12 Rule 1 and Order 39 Rule 10 of the Code of Civil Procedure is that a Court can, in a case of this kind, in fair exercise of its judicial discretion order for deposit of money pending decision of a suit. Surely, the provisions of Section 151 of the Code of Civil procedure can be invited in aid to cover all such cases as are analogous to these principles. This being the position, invocation of Section 151 in the present case would neither be in conflict with what has been expressly provided in the Code nor against the intention of the legislature."

12. In the decision of Karam Kapahi (supra) the Hon'ble Apex Court directed payment of rent during the pendency of the suit and laid down as follows:-

"58. In so far as non-payment of lease rent is concerned, the Club has admitted it in its written statement in paragraphs (8) and (10). The Club has also admitted it in its reply to the Trust's petition under Order 12 Rule 6 referred to hereinabove. The Club has also admitted non-payment of rent in its petition under Section 114 of the Transfer of Property Act where it sought the equitable remedy of forfeiture and which has been denied to it by the High Court for valid reasons.

59. From the pleadings between the parties in this case the following things are admitted:

- (a) the Club has admitted in its written statement that the Trust is its Lessor;
- (b) the Club has also admitted that it has not paid the lease rent;
- (c) the Club has also admitted that the lease rent is more than Rs.3500/- per month in its reply to the Trust's petition under Order 12 Rule 6;
- (d) the Club has also admitted the receipt of notice of termination of lease issued by the Trust on the ground of non-payment of lease rent."

13. In the decision of Sanjay Gupta (supra) Delhi High Court held that as there was no dispute with the admitted position that when there existed a landlord-tenant relationship between the plaintiff and the defendant, the liability to pay such rent could not be avoided and the minimum charges could be directed to be paid at the last paid rent either on account of rent or on account of damages or on account of occupation charges till the vacation of the property and the said amount could be adjusted towards mesne profit and damages. The relevant paragraphs are quoted below:-

"39. In a landlord tenant dispute where their relationship is admitted, the obligation of the tenant to pay rent for the tenanted premises during the period that the tenant is in occupation of the premises cannot be disputed. Inherent in this admission is embedded an obligation to pay the rent/occupation charges, because the admission of the said relationship excludes a claim based on any other title to the property. The relationship between a landlord and a tenant is one where the tenant agrees to pay the rent/occupation charges in consideration

for the right granted to him by the landlord to use and occupy the premises. Therefore, he cannot, while being in use or occupancy of the premises, not pay the rent/occupation charges therefore. However, the tenant may set up defenses to justify suspension of his obligation to make payment of rent, of the kind raised in the present case. Once those defenses have been considered and rejected by the court, it necessarily follows that the obligation of the tenant to pay the rent is established and the tenant holds the money due on account of rent on behalf of landlord. In Sangeeta Prints v. Hemal Prints and Ors. the Bombay High Court relied upon its earlier Division Bench Judgment in the case of Chandrakant Shankarrao Deshmukh v. Haribhau Tukaramji Kathane 1983 Mah. LJ 88 to hold that in case of a landlord and a tenant, the tenant cannot dispute his liability to pay rent to the landlord although the quantum of such rent may be in dispute. The tenant, in fact, is deemed to admit some money is due to the plaintiff. In such situation the court can direct the tenant to deposit such amount as the court may deem fit under Order XXXIX Rule 10 CPC.

40. Also, in Surjit Singh v. H.N. Pahilaj this Court while considering the object of Order 12 Rule 6 CPC, held that relief under the said provision was also available where liability to pay is not denied but being avoided on untenable pleas. The power in such cases could also be exercised under Order XXXIX Rule 10 CPC. The court held that under Section 151 every court is constituted for the purpose of doing justice according to law and must be deemed to possess, as a necessary corollary and as inherent in its very constitution, all such powers as may be necessary to do the right and to undo a wrong in the

course of the administration of justice. In appropriate cases the Court can exercise powers under Section 151 CPC where Order 12 Rule 6 or Order 39 Rule 10 CPC may not be applicable for the purpose of doing justice or to prevent abuse of the process of the court.

41. There is no dispute and the admitted position is that there existed a landlord-tenant relationship between the Plaintiff and the Defendant. Admittedly, rent/damages/occupation charge has not been paid by the Defendant after May 2002 till the premises were vacated by the Defendant after March 2003. This liability cannot be avoided, since it is to be met by the defendant irrespective of whether the status of the defendant during the period in question was that of a tenant or of a trespasser holding over after the determination of the lease. The last paid rent would be the minimum charges that would be payable either on account of rent or on account of damages. If it is ultimately found that the tenancy of the suit premises subsisted throughout till the vacation of the property, it would be adjusted towards rent, and if it is found that the lease was validly terminated, it would be adjusted towards partial damages. The defendant is wrong in contending that the plaintiff by way of the applications under considerations is claiming 'rent' while the claim in the suit is for damages. The claim even in the applications is for damages, though, to avoid a controversy at this stage the plaintiff has limited the prayer for grant of partial damages computed at the rate at which admittedly the rent was last paid. After a trial, it may be found that the lease of the defendant stood validly terminated and in

that eventuality the damages could be still higher, but to the extent of the last paid rent it is the minimum.

Therefore, so far as the amount of last paid rent is concerned @ Rs. 3.50 lakhs per month, the defendant is liable to pay the same to the plaintiff for the period June 2002 to March 2003. The defendant is hereby directed to pay the same to the plaintiff within two months of the passing of this order for the period 1.6.2002 till 31.3.2003 i.e. for a period of ten months, which translates to Rs. 35 lakhs. The plaintiff had taken a security deposit of Rs. 15 lakhs from the defendant under the lease deed. After adjustment of the same, the defendant would be liable to pay to the plaintiff at this stage, a sum of Rs. 20 lakhs. Since the amount now being directed to be paid to the plaintiff is not in excess of the amount for which the suit is valued, no further court fee is payable at this stage. Consequently, no issue of payment of court fee would arise for the time being. The question of payment of interest, if any, on the said amount would be considered at the final stage. So far as the maintenance charge are concerned, in view of the law discussed hereinabove, since the said liability is conditional upon the rendering of the agreed services by the landlord and it cannot be treated as payment for use and occupation of the tenanted premises and there is a dispute about the said services having been rendered or not, at this stage, I am not inclined to pass any order to direct the defendant to either pay the same to the plaintiff or even to deposit the same in the court. The payments directed by me by this order are without prejudice to the rights and contentions of the plaintiff in relation to its claim for damages and so far as the claim for arrears of

maintenance charges are concerned. The said claims, and the claim for interest shall be considered only after the parties have led their evidence in respect thereof."

In the case of Nripendra Narayan Ghosh (supra) a Learned Single Bench of this Court observed as follows:

“7 It is obvious that the fate of present suit shall be final and binding subject to its judgment, which of course is appealable. But before final disposal of such suit the result is unknown to either of the parties. Meaning thereby the landlord can expect his success but cannot be sure till the disposal of the eviction suit. Till before final disposal there may be several unknown eventualities. Suit may end into compromise. It may be dismissed for default. It may be decreed ex parte. Suit may abate in the available situation till before its completion. Therefore, had there been order compelling the occupant to pay occupational charges to the petitioner during pendency of the suit it is not desirable because it would create complication had there been failure in the event of getting success in the suit by the landlord. That apart, the decree of mesne profits or damages are subject to determination. The petitioner can pray the amount but grant upto what extent, or not all is subject to adjudication. In view of the case of Kanak Projects Limited V. Oil and Natural Gas Corporation Ltd. (supra) this Court is not expressing any doubt about not having the authority of power of the Court to award reasonable compensation but the term “reasonable compensation” would arise only when the suit comes to an end

with the result bearing direction of eviction of the occupant from the suit premises. On the other hand, had there been no success in the suit then any such direction upon the occupant would be unreasonable.

In the case of Kanak Projects Limited V Oil and Natural Gas Corporation Limited reported in (2014) 1 Cal LJ (Cal) 337 Hon'ble Single Bench of this Court observed as follows:

“28. Although Atma Ram dealt with the power of Appeal Court to grant provisional mesne profit, the principles are the same, if applied to an eviction suit pending before the trial Court. When a suit for eviction is pending before the Appeal Court the appeal is merely a continuation of the trial Court proceedings. It is true that when the case is before the Appeal Court, there is already a decree of eviction case is before the Appeal Court, there is already decree of eviction. The Appeal Court has to consider the grant of mesne profit considering the decree for eviction. At the trial Court there is no such decree. But the same principles, in my opinion, can be applied. If the trial Court finds that there is absolutely no defense that the defendant has to the claim for eviction made by the plaintiff and that eviction would be a matter of course, it can apply the principles in Atma Ram's case for award of interim mesne profits pending passing of the final decree. This is more the need when the case is pending of the final decree. This is more the need when the case is pending for a long time. This is one such case where considering its duration, I would apply the said principle laid down in the case of Atma Ram. The Hon'ble Supreme Court has gone to the extent of saying in this

case that the Court has the power of awarding any reasonable compensation for continued use of the property by the defendant.”

Whether mesne profits is to be granted at the interlocutory stage or after disposal of the suit has to be decided upon considering the contentions of the parties in plaint and written statement. Upon considering the contentions in the plaint and written statement the Court should come to a finding as to whether mesne profits should be granted at the interlocutory stage or on disposal of the suit. Such findings should be by a reasoned order.

However with regard to occupational charges of the suit property from the judicial decisions it is clear when relationship of either landlord and tenant or Lessor and Lessee or licensor and licensee is admitted by the defendant, the defendant is liable to pay occupation charges.

Upon perusal of the order dated 15-12-2021 passed by Learned Trial Court it appears that the learned Court did not decide the application for occupation charge made under Section 151 CPC by the petitioner/plaintiff, by a reasoned order and simply adjourned the same for consideration at the time of final adjudication of the suit. Learned Judge ought to have considered the application of the petitioner/plaintiff on the basis of contentions made in the plaint and written statement and arrived at a finding by a reasoned order as to whether the relief prayed for by the petitioner/plaintiff in the application under Section 151 CPC should be granted at the interlocutory stage or at the time of final adjudication of the suit. The Learned Judge by not deciding the

application under Section 151 CPC by a reasoned order has erred in law. Thus the order passed by the learned trial Judge cannot be sustained and the same should be set aside.

Hence this Revisional Application stands allowed. Order dated 15-12-2021 passed by Learned Civil Judge (Senior Division) 5th Court at Alipore in Title Suit No 157 of 2016 with regard to application u/s 151 CPC is set aside. The matter is remitted back to the Learned Court below to consider and decide the application of the plaintiff/petitioner dated 04/10/2021 under Section 151 CPC in accordance with law and to pass a reasoned order.

As the suit is pending from 2016, learned trial Court is requested to dispose the application as well as the suit very expeditiously.

This Application stands disposed.

Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Biswaroop Chowdhury,J)