

April 4, 2024
Sl. No.22
Court No.19
s.biswas

CO 2670 of 2023
With
CAN 1 of 2023

Dinesh Kumar Goyal
vs.
Kanakendra Mohan Chowdhury and others

Mr. Pratyush Patwari
... for the petitioner
Mr. Pratik Majumder
... for the opposite party nos.1 to 3

1. The revisional application arises out of an order dated July 25, 2023 passed by the learned Civil Judge (Senior Division), 2nd Court at Barasat in Misc. Case No.24 of 2019.
2. By the order impugned, the learned court rejected an application for occupational charges filed by the petitioner on the ground that the application was not maintainable. According to the learned court, the application under Section 151 of the Code of Civil Procedure was not a substantive provision which had conferred the jurisdiction upon the court to pass such order. Inherent power could be invoked only under special circumstances, and for the ends of justice.
3. The learned advocate for the petitioner submits that by an order dated March 22, 2023, passed in CO 1189 of 2019, the petitioner was allowed to be added as a party in the revisional application. Liberty was granted to the petitioner,

to pray for being added as a party in the misc. case and also pray for occupational charges.

4. The court observed that Dinesh Kumar Goyal had purchased the suit property from the erstwhile owners after the decree was passed. Accordingly, liberty was granted to the petitioner to add himself also in the misc. case.
5. The misc. case is an application under Order 9 Rule 13 filed by the judgment debtors, for setting aside the ex parte decree of eviction. The application for addition of party filed by the petitioner in the misc. case on the basis of the liberty granted by the court, was also allowed and the learned trial judge was of the view that the misc. case should be disposed of in the presence of the petitioner. The petitioner was added as a party. The court held that the ex parte decree granted in favour of the vendors of the petitioner will be considered to have been granted in favour of the petitioner as he had interest in the decretal property. Accordingly, the application under Order 1 Rule 10 read with Order 22 Rule 10 of the Code of Civil Procedure was allowed.
6. Learned advocate submits that on the basis of the liberty granted by the High Court and the addition by the learned trial court in the Misc

Case, there was recognition by the courts that the petitioner had stepped into the shoes of the decree holders. The suit property had devolved upon him. Thus, an application for occupational charges was filed by the petitioner based on the principles enunciated by the Hon'ble Apex Court in ***Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd.***, reported in ***(2005) 1 SCC 705***.

7. The learned advocate for the judgment debtors submits that the assignment to the petitioner was illegal, contrary to law and a subsequent assignment. The judgment debtors had been assigned the property earlier. Unless the ownership of the petitioner was proved, the petitioner could not be allowed to claim occupational charges.
8. It is settled law that if the judgment debtors, continue to be in possession of the property, they must compensate the decree holders. The High Court, prima facie, was of the view that there had been devolution of the property on the petitioner. The trial judge added him as a party, holding that the petitioner had stepped into the shoes of his vendors/decreed-holders. That the right of the vendors had devolved upon the petitioner. Such orders were not challenged.

9. While granting stay of the execution, the High Court granted liberty to the petitioner to pray for occupational charges in the Misc. Case No.24 of 2019, which was also not challenged by the judgment debtors. The right and liabilities of the parties will be decided in the main suit, in the event the ex parte decree is set aside.
10. The contention of the judgment debtors that the petitioner does not have any right, title and interest is of no consequence while considering whether the occupational charges should be allowed or not, as per the principles laid down in ***Atma Ram Properties (P) Ltd.*** (supra). These issues will be decided at the appropriate stage, as per law. The Misc. case is with regard to setting aside of the ex-parte decree and the judgment debtors are to prove either summons were not served or they were prevented by sufficient cause from contesting the suit.
11. The decision in ***Poonam Kejriwal vs. Bagwandas Auto Finance Ltd. & Ors.*** reported in **(2009) 4 ICC 484 (Cal)(DB)** does not apply to the facts in hand, especially because the present suit has been disposed of and decreed ex parte against the judgment debtors. The judgment debtors prayed for stay of the execution. The execution was stayed. The petitioner stepped into

the shoes of the decree-holder. The petitioner is being deprived of the fruits of the decree. In order to ameliorate the sufferings of a decree holder, who was armed with a decree of eviction but could not execute the same, the law was declared by the Hon'ble Apex Court with regard to the right of a decree holder to claim occupational charges.

12. The relevant portion of ***Atma Ram Properties (P)***

Ltd. (supra) is quoted below:-

“**13.** In *Shyam Charan v. Sheoji Bhai* [(1977) 4 SCC 393] this Court has upheld the principle that the tenant continuing in occupation of the tenancy premises after the termination of tenancy is an unauthorised and wrongful occupant and a decree for damages or mesne profits can be passed for the period of such occupation, till the date he delivers the vacant possession to the landlord. With advantage and approval, we may refer to a decision of the Nagpur High Court. In *Bhagwandas Lakhamsi v. Kokabai* [AIR 1953 Nag 186 : 1952 Nag LJ 393] the learned Chief Justice of the Nagpur High Court held that the Rent Control Order, governing the relationship of landlord and tenant, has no relevance for determining the question of what should be the measure of damages which a successful landlord should get from the tenant for being kept out of the possession and enjoyment of the property. After determination of the tenancy, the position of the tenant is akin to that of a trespasser and he cannot claim that the measure of damages awardable to the landlord should be kept tagged to the rate of rent payable under the provisions of the Rent Control Order. If the real value of the property is higher than the rent earned then the amount of compensation for continued use and occupation of the property by the tenant can be assessed at the higher value. We find ourselves in agreement with the view taken by the Nagpur High Court.

13. The execution was stayed at the instance of the judgment debtors. The Code of Civil Procedure also permits the petitioners to proceed with the execution. It is also not in dispute that an application under Section 151 of the Code of Civil Procedure can be entertained with a prayer for payment of occupational charges. The provisions of Section 151 of the Civil Procedure Code can be resorted to in the interest of justice. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act *ex debito justitiae* for doing real and substantial justice between the parties. The Hon'ble Apex Court had occasion to observe in the case of ***Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal***, reported in ***AIR 1962 SC 527***, that:-

"It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them."

14. The learned court erred in holding that the application was not maintainable. The Code does not make a specific provision under which a prayer for occupational charges can be made. Thus, the court should have invoked inherent

power in order to decide the application. Moreover, the occupational charges are usually deposited in court till the disposal of the Misc. case.

15. The decision of the learned court is erroneous.

The order impugned is set aside. The matter is remanded to the learned court for a decision on the application for occupational charges afresh, on its own merits, in the light of the decisions of the Hon'ble Apex Court and followed by the High Court. The application will be disposed of within a period of two months from the date communication of this order.

16. The revisional application and connected application stand disposed of accordingly.

17. All the parties are directed to act on the basis of the server copy of the order.

18. Urgent Photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Shampa Sarkar, J.)