

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

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 3892 of 2023

Sri Badal Chandra Ghorai alias Badal Ghorai

VERSUS

Sri Prabir Kumar Maity

For the petitioner:

Mr. Animesh Paul, Adv.
Ms. Bishruti Chattopadhyay, Advs.
Mr. Apurba Ghauti, Adv.
Mrs. Priti Jain, Advs.

for the opposite party:

Last Heard on: July 26, 2024

Judgment on: August 02, 2024

Biswaroop Chowdhury,J:

The petitioner before this court is a judgment debtor in a suit for eviction and is aggrieved by the Order dated 07-10-2023 passed by Learned Civil Judge (Junior Division) 1st court Alipore 24 Parganas (South) in Ejectment Execution Case No. 25 of 2023 arising out of Ejectment Suit of 166 of 2017.

The petitioner/Judgment Debtor being aggrieved by the Order dated 07-10-2023 passed by Learned Executing Court has come up with this application.

The case of the petitioner in application for stay of Execution Proceedings before the Learned Executing Court may be summed up thus;

1. The decree holder has filed the instant execution case against the judgment debtor to execute the Ex-parte Judgment dated 03.06.2022 and Decree dated 13.03.2023.
2. The judgment debtor on getting knowledge about the instant execution case from reasonable source has entered appearance before the Ld. Court by filing Vakalatnama on 20.04.2023.
3. In connection with the aforesaid suit after adducing ex-parte evidence the Opposite party/Decree Holder/Plaintiff has obtained Ex-parte Judgment and Decree from the Learned Court vide the Judgment dated 03.06.2022 and Decree dated 13.03.2023 against the judgment debtor upon misrepresentation and fraud practice upon the court.
4. That in connection with the suit, summons from the Learned Court has never been served upon the judgment debtor neither through Court nor registered post from the Ld. Court and Petitioner/Defendant/Judgment Debtor has no knowledge about the Ejectment Suit.

5. The judgment debtor recently collected knowledge about the instant ejectment suit from the reasonable sources and thereafter made contact with his Ld. Advocate Mr. Debashish Chowdhury who applied for searching report on 22.03.2023 whether therein any ejectment suit has been filed by the plaintiff/opposite Party/deGREE Holder against the judgment debtor and on the same date also applied for searching report whether any ejectment execution case has been filed by the plaintiff/opposite party/deGREE holder against the judgment debtor. On the same date the judgment debtor obtained searching report wherefrom it is revealed that the said Ejectment Suit has been filed by the plaintiff/opposite party/deGREE holder against the Judgment debtor/petitioner.
6. The judgment debtor has no prior knowledge about the Ejectment Suit before obtaining the searching report and after getting knowledge about the Ejectment Suit the judgment debtor applied for certified copy of all orders along with judgment and also applied for the certified copy of the plaint on 22-03-2023. Ultimately on 1.04.2023 the judgment debtor obtained certified copy of the plaint and all orders including judgment.
7. It transpired from the order dated 1.11.2017 that the summon through Registered Post returned with remark 'Refused' on 07.09.2017 and next date fixed on 15.01.2018, for S/R through

Court. On 15.01.2018 there was no S/R Return, and next date was fixed on 08.02.2018 for S/R through Court.

8. On 08.02.2018 on the basis of alleged service of summon through registered post, which was returned with remark as 'Refused' the Learned Court was pleased to fix ex-parte hearing of the suit against the judgment debtor.
9. That no summon has been served upon the judgment debtor in any manner, the plaintiff/opposite party/deGREE holder has managed the postal authority and returned the summon through registered post with remark as "refused".
10. It also transpired from the Order Sheet as well as record that without considering the report of Bailiff in regard to the service of summons through Court, the Ex Parte Order has been passed against the Judgment Debtor.
11. The plaintiff filed the instant purported suit for eviction against the Judgment Debtor and deliberately mentioned wrong holding in the cause title and the schedule of the plaint with a mala fide intention to obtain ex parte decree from the Ld. Court by misguiding, misrepresentation and fraud practice upon the Ld. Court.

Pursuant to filing application for setting aside ex-parte decree being Misc Case 53/2023 before the Learned Trial Court the petitioner also filed application for stay of the ex-parte decree before the Learned Trial court and application for stay of execution of the decree before Learned Executing Court.

By Order dated 01-07-2023 Learned Executing Court upon considering the stay petition filed by the petitioner/judgment Debtor on 24-02-2023 was pleased to observe and direct as follows:

‘On consideration of the above I find that the J.Dr prefers an application U/Or 9.r 13 for setting aside the exparte order. The J.Dr further points out. certain apparent discrepancies with regard to the mentioning of the address of the schedule property of the plaint of the original suit. Therefore I am inclined to stay the execution proceeding of this instant case till the outcome of the said misc case.

Hence the execution is stayed till further order/outcome of the said misc case.

In respect of the occupational charges as advanced by the Ld. Advocate for the D.hr, I find that no specific description prayer has been set out for ascertaining the occupational charges of the premises. It is the settled position of law that the D.Hr is entitled for occupational charges pending eviction execution. Therefore the D.Hr is directed to take proper steps in respect of the prayer for occupational charges by filing proper document for ascertaining the occupational charges by this Court.’

Fix 02.09.2023 for further order/taking proper steps for ascertaining occupational charges.’

On 7-10-2024, the matter appeared before the learned Court below for further order regarding occupation charges. Upon considering the petition of the decree holder/opposite party for occupational charges the Learned Court was pleased to observe and direct as follows:

‘J.Dr files prayer of adjournment on the ground of preferring a revisional application before the Hon’ble High Court at Calcutta in respect of the order of this Court dated 01.07.2023.

Considered the adjournment prayer.

I find that the copy of the instant application in respect of occupational charges preferred by the D.Hr has been served upon J.Dr on 16.09.2023. So I do not find any sum and substance of the adjournment prayer of the Ld. Advocate for the J.dr.

Further, the contention of the J.Dr for staying the hearing of instant application for occupational charges on the ground that the original suit was decided exparte, is found meritless. Hence, I am inclined to reject the adjournment prayer of the J.Dr.

Heard Ld. Advocate for the D. Hr.

Ld. Advocate for the D. Hr submits that an occupational charge amounting to tune of Rs. 4,500/- to 5,000/- is required to be paid for the suit premises.

Ld. Advocate for the D. Hr further advanced contention to that effect that the suit premises is located at a posh locality. As such the D. Hr may easily fetch an amount of Rs. 4,500/- to Rs. 5,000/- by letting the same on rent.

Considered the judgment passed in the original suit. It is found that the original suit was filed in the year 2017. It is further found from ex parte judgment that the defendant lastly paid rent for the suit premises in the year 2004 for the month of October 2004. The amount of last paid rent was Rs. 70/- per month.

Hence on consideration of the fact, I am inclined to allow the prayer of D. Hr.

Hence it is ORDERED

That the instant application of occupational charges preferred by DHr is allowed. J. Dr is directed to pay occupational charge of Rs. 4,500/- per month regularly within 7th day of the month else the execution would proceed.

Fix 02.03.24 for taking steps (if any) by both the parties to this execution case.'

The Petitioner being aggrieved by the Order dated 07-10-2023 passed by Learned Court below filed this application under Article 227 of the Constitution of India.

It is the contention of the petitioner that the Learned Judge in the Court below erred in law and acted with material irregularity in directing the opposite

party to take proper steps in respect of the prayer for occupational charges pending Eviction Execution Case while allowing the application for stay filed by the petitioner herein, more specifically when there was no such pleading made by the opposite party herein in his written objection to the said application for stay. It is further contended that the Learned Judge in the Court below erred in law and acted with material irregularity in allowing the application filed by the opposite party herein by fixing Rs. 4500/- per month as occupational charges, without recording a single finding in support of the same as to how the Learned Judge has ascertained the said amount to be the occupational charge. It is also contended that there has been no documents, produced by the opposite party in support of his claim for ascertainment of such higher occupational charge and the orders impugned are completely non-speaking unreasoned and also lack application of judicious mind by the Learned Judge in the court below.

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

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 without applying the mind to the facts of the case arbitrarily fixed the occupational charge Learned Advocate further submits that the order fixing the occupational charge by the Learned Court below is devoid of reasons. Learned Advocate also submits that although courts are empowered to fix reasonable

occupation charges but the occupational charges fixed by the Learned Court is not at all reasonable.

Learned Advocate relies upon the following decision.

Niyas Ahmad Khan Vs Mahmood Rahmat Ullah Khan and Anr.

[Reported in (2008) 7 SCC. P-539.]

Learned Advocate for the opposite party submits that the learned court below has taken different factors into consideration in ascertaining the occupational charge. Learned Advocate draws attention to the map showing location of the suit property and submits that considering location of the suit property occupational charge fixed by learned court below is just and proper.

It is held in different judicial pronouncements that a tenant who has suffered an eviction order/decreed passed by any Court/Tribunal/Authority, prefers either appeal against the said decree/order before the Appellate Court or Appellate Authority or files Writ Petition in High Court, the Appellate Court or High Court may stay the execution proceedings on the payment of reasonable occupation charges of the suit property.

Now the point for consideration is whether the principles applicable to stay execution, pending appeal or Writ Petition is also applicable when an application is filed under Order IX Rule 13 of the Code of Civil Procedure and stay of execution of ex-parte eviction decree is sought. In order to find answer

to this issue it is necessary to consider the provisions laid down under Order IX Rule 13 of the Code of Civil Procedure.

Order IX Rule 13 of the Code of Civil Procedure provides as follows:

‘Setting aside decree ex-parte against defendant-In any case in which a decree is passed ex parte against a defendant he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.’

Thus upon considering the provision contained in Order IX Rule 13 of the Code of Civil Procedure it will appear that in the application for setting aside ex-parte decree the court has to consider the issue as to whether summons was duly served upon the defendant or not and whether the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing.

Hence the procedure for deciding an application for setting aside ex-parte decree is not at all lengthy in comparison to deciding an Appeal or Writ Petition. It may take few years to dispose of Appeal or Writ Petition, but in the case of application for setting aside ex-parte decree it may not take more than two months unless it is an exceptional case requiring examination of witnesses.

Before further proceeding with the issue with regard to the power of court to direct payment of occupational charges for stay of execution proceedings it would be reasonable to take into consideration the decision of the Hon'ble Supreme Court in the case of Atma Ram Properties (P) Ltd V Federal Motors (P) Ltd reported in (2005) 1 SCC-P-705.

The Hon'ble Apex Court in the case of Atma Ram Properties (P) Ltd. held that once a decree for eviction has been passed in the event of execution of decree for eviction being stayed the appellants can be put on such reasonable terms as would in the opinion of the appellate court reasonably compensate the decree holder for loss occasioned by delay in execution of the decree by the grant of stay in the event of the appeal being dismissed. It has also been held that with effect from the date of decree of eviction, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises on being vacated by the tenant. While determining the question of the amount so receivable by the landlord, the landlord is not bound by the contractual rate of rent which was prevalent prior to the date of decree.

The Hon'ble Apex Court further observed as follows:

4. 'Ordinarily this Court does not interfere with discretionary orders, more so when they are of interim nature, passed by the High Court or subordinate Courts/Tribunals. However, this appeal raises an issue of frequent recurrence and, therefore, we have heard the learned counsel for the parties at

length. Landlord-tenant litigation constitutes a large chunk of litigation pending in the Courts and Tribunals. The litigation goes on for unreasonable length of time and the tenants in possession of the premises do not miss any opportunity of filing appeals or revisions so long as they can thereby afford to perpetuate the life of litigation and continue in occupation of the premises. If the plea raised by the learned senior counsel for the respondent was to be accepted, the tenant, in spite of having lost at the end, does not lose anything and rather stands to gain as he has enjoyed the use and occupation of the premises, earned as well a lot from the premises if they are non-residential in nature and all that he is held liable to pay is damages for use and occupation at the same rate at which he would have paid even otherwise by way of rent and a little amount of costs which is generally insignificant.'

Thus upon considering the decision of Atma Ram Properties (P) Ltd (supra) it is clear that on Appeal being preferred the Appellant Court may put the appellant who has suffered an eviction decree to reasonable terms to reasonably compensate the decree holder for loss occasioned by delay in execution of the decree by the grant of stay in the event of the appeal being dismissed.

As it may take a considerable period to dispose of an appeal or writ petition it is not just or proper to deprive the decree-holder to enjoy the fruits of the decree for a considerable period till disposal of appeal or writ petition, thus

judgment debtors are imposed condition to pay/deposit occupational charges during pending of appeal which is to abide by the result of the appeal.

However the principles of imposing condition by directing payment of occupational charges may not apply in case of stay of execution of decree pending disposal of application under Order IX-Rule 13 of the Code of Civil Procedure. It has to be remembered that an application under Order IX Rule 13 of the Code of Civil Procedure is filed by judgment debtor who did not get an opportunity to defend his case and the case is decided in his absence, and he has come to get the order recalled and for an opportunity of being heard. The hearing of this application cannot be equated with hearing and disposal of appeal as in the case of appeal, mostly contested decrees are challenged and disposal of an appeal on merits takes a considerable time. The situation not being similar in case of hearing of application for setting aside ex-parte decree, where such application are disposed within a very short the condition of payment of accommodation charge may not be imposed during pendency of disposal of the application. As the Court which has passed the ex-parte decree has the power to set aside the decree upon being satisfied that summons was not duly served upon the defendant or that the defendant was prevented by sufficient cause in appearing when the suit was called for hearing upon such terms as to costs necessary orders with regard to terms may be passed after disposal of the application under Order 9 Rule 13 of the Code of Civil Procedure and not prior to the said disposal.

Now with regard to the issue of stay of execution it is necessary to consider the provisions contained in order 41 Rule 5 sub-Rule-3 of the Code of Civil Procedure.

Order 41 Rule 5 sub-Rule-3 of the Code of Civil Procedure provides as follows:

No order for stay of execution shall be made under sub-rule(1) or sub-rule(2) unless the Court making it is satisfied-

- a) That substantial loss may result to the party applying for stay of execution unless the order is made;
- b) That the application has been made without unreasonable delay and.
- c) That security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

Thus upon being satisfied that substantial loss may result to the party applying for stay of execution unless the order is made, the Court which passed the decree may stay execution of the decree upon security being furnished by the applicant for the due performance of such decree or order as may ultimately binding upon him. However nature of security to be furnished varies with the nature of decree. For example in case of money decree the defendant/decreed-holder may be directed to secure the decretal amount and in case of eviction decree the judgment debtor may be directed to execute a bond not to part with the suit property and not to cause damage to the suit property, or a receiver may be appointed to take symbolic possession of suit property.

Although appellate court has power to impose condition for payment of occupational charge to stay execution of eviction decree but such power ordinarily should not be exercised by the trial court hearing application of setting aside ex-parte decree unless it is a very exceptional case and the disposal of such application will take a considerable period.

In the instant case the learned court below stayed the execution case till disposal of the application for setting aside ex-parte decree and also imposed condition for payment of occupational charge of Rs. 4,500/- per month which according to the petitioner is exorbitant. Although courts while admitting appeal or application and staying execution of decree is empowered to impose occupation charge but the said occupational charge should be reasonable. As the trial Court has exercised such discretion by directing payment of occupation charges and the petitioner has made payments in terms of interim order passed by this Court it is necessary to consider as to whether the occupational charge fixed by Learned Trial Court is reasonable and fair. In this regard it would be just to refer to the decision of the Hon'ble Supreme Court of India in the case of Niyas Ahmad Khan (supra).

The Hon'ble Supreme Court in the case of Niyas Ahmad Khan (supra) was pleased to observe as follows:

'We should however note the distinction between cases where a writ petition is filed by the tenant challenging the order of eviction and seeking stay of execution thereof, and cases where a writ petition is filed by the landlord

challenging the rejection of a petition for eviction. What we have stated above is with reference to writ petitions filed by landlords. In writ petitions filed by tenants, while granting stay of execution of the order of eviction pending disposal of writ petition, the High Court has the discretion to impose reasonable conditions to safeguard the interests of the landlord. But even in such cases the High Court cannot obviously impose conditions which are *ex facie* arbitrary and oppressive thereby making the order of stay illusory. When a tenant files a writ petition challenging the order of eviction, the High Court may reject the writ petition if it finds no merit in the case of the tenant; or in some cases, the High Court may admit the writ petition but refuse to grant stay of execution, in which event, the tenant may be evicted, but can claim restoration of possession if he ultimately succeeds in the writ petition; or in some cases, the High Court finding the case fit for admission, may grant stay of eviction, with or without conditions, so that status quo is maintained till the matter is decided. Where the High Court chooses to impose any conditions in regard to stay, such conditions should not be unreasonable or oppressive or *in terrorem*. Adopting some arbitrary figure as prevailing market rent without any basis and directing the tenant to pay absurdly high rent would be considered oppressive and unreasonable even when such direction is issued as a condition for stay of eviction. High Court should desist from doing so.

Upon perusing the order passed by Learned Court below although it cannot be said at this stage that the occupational charge fixed by Learned Trial court is *in terrorem* but the said order lacks material particulars for accepting

the contention of decree holder/opposite party and arriving at a finding that occupational charge of the suit property should be Rs. 4,500/- per month. A tenant under the West Bengal Premises Tenancy Act 1997 is liable to pay fair rent. In the event of dispute fair rent is determined by the Rent Controller under Section 17 of the West Bengal Premises Tenancy Act 1997. Although a Rent Controller does not have jurisdiction to determine fair rent after decree of eviction is passed and the power to determine occupational charge/rent is exercised by court of Appeal, or Revision or Trial Court in some circumstances but courts have to determine occupational charge which is fair and reasonable. In order to determine fair and reasonable rent the courts should consider the area of the suit property, the age of the premises, physical condition of the premises, facilities available to the tenant in the suit premises and if necessary valuation of the suit premises upon appointment of a valuer. Upon taking these aspects into consideration and upon taking into consideration rents of similar type of premises in the locality courts may fix rent/occupational charge which in its opinion is fair and reasonable. As the learned court has not taken into consideration the factors as mentioned above in fixing occupational charge the Order passed by the Learned Court below cannot be sustained and the same should be set aside. The matter should be reconsidered by the learned Court below upon consideration of report of special officer to be appointed by this Court.

Thus Sri Bidhayek Lahiri Learned Advocate High Court Calcutta having seat at Bar Association Room No-15 and mobile no. 9433707613 is appointed

as special officer to conduct inspection of the suit property. Learned special officer shall upon notice to the parties, visit the suit property, take photographs of the suit property, photograph of the inner walls, the floor, and ceiling. Learned Special Officer shall also record the age of the premises and photograph of the surrounding. Upon taking photograph and upon inspecting the suit premises the Learned Special Officer shall mention the condition of the building in his report. The Special Officer shall upon receipt of this order complete the inspection within 3 weeks and submit the report within 1 week thereafter. Learned Special Officer shall be entitled to a remuneration of Rs. 6,000/- to be paid by the petitioner. Incidental Costs incurred by the Special Officer shall also be borne by the petitioner Copy of the plaint shall be served upon the Special Officer by the petitioner.

Hence this revisional application stands allowed. Order dated 07-10-2023 passed by Learned Civil Judge (Junior Division) 1st Court at Alipore, South 24 Parganas in Ejectment Execution Case No-25 of 2023 arising out of Ejectment Suit No. 166 of 2017 is set aside. The matter is remitted back to the Learned Court below to reconsider the issue of occupation charge upon receipt of the report of the Learned Special Officer as observed above and by a reasoned order. It is clarified that there shall be stay of the execution case till the occupation charge is decided. Upon deciding the occupational charge the Learned Court below shall decide the application for setting aside ex-parte decree being Misc Case 53/2023 very expeditiously without granting unnecessary adjournment.

The Execution shall proceed if occupational charge upon being decided is not paid, by petitioner/judgment debtor as per the terms fixed by Learned Court.

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.)