

(2024) 10 PAT CK 1199

In the Patna High Court

Case No : Civil Miscellaneous Jurisdiction No.801 Of 2017

Devendra Singh

APPELLANT

Vs

Kailash Prasad

RESPONDENT

Date of Decision : 30-10-2024

Acts Referred:

Constitution Of India, 1950 — Article 227
Code of Civil Procedure, 1908 — Section 151, Order 9 rule 13, Order 20 Rule 12,
Order 26 Rule 10(B)

Citation : (2024) 10 PAT CK 1199

Hon'ble Judges : Arun Kumar Jha, J

Bench : Single Bench

Advocate : Jitendra Prasad Singh, Abhishek, Keshav Shrivastava, Arvind Kumar Verma, Tushar Anand

Final Decision : Allowed

Judgement

Arun Kumar Jha, J

1. The instant petition has been filed under Article 227 of the Constitution of India by the petitioner for setting aside the

order dated 16.01.2017 passed by the learned Sub Judge 2nd, Kaimur at Bhabhua in Execution Case No. 05 of 1996 whereby and whereunder the learned Executing Court directed the judgment debtor to pay Rs.1,73,920/- to the decree holder as mesne profits.

2. Briefly stated, the facts of the case are that the respondent no. 1/respondent 1st set was the plaintiff in Title Suit No. 64 of 1986 and he filed a suit for recovery of possession over the suit land as well as for mesne profits. It has been pleaded by the plaintiff that the defendants were in need of money for purchase of tractor and they executed three sale deeds on 31.10.1983 with respect to suit property as mentioned in Schedule 'Ka' of the plaint for Rs.15,000/- but only part payment of Rs.5,000/- was made at the time of

execution of the sale deed. Subsequently, the plaintiff paid remaining consideration amount of Rs.10,000/- but possession of the property was not delivered by the defendants and as such the plaintiff filed the title suit seeking relief of recovery of possession as well as the mesne profits. The petitioner and

respondent 2nd set were the defendants. The suit was decreed ex parte by the learned Sub Judge, Bhabhua vide judgment and decree dated 05.09.1988 and 26.11.1988, respectively with a direction to the defendants to deliver the title of the plaintiff over the suit land. The learned trial court further decreed that the plaintiff could recover the mesne profit of Rs.7950/- through the process of the court. It further appears that the defendants filed a miscellaneous case under Order 9 rule 13 read with Section 151 of the Code of Civil Procedure (in short "the Code") for setting aside the ex parte decree but the miscellaneous case of the defendants was dismissed for non prosecution on 17.11.1997. Further case of the petitioner is that though the plaintiff came in possession over the land in question after the ex parte judgment and decree in the year 1988, in order to harass the defendants, he filed an execution case in the year 1996 bearing Execution Case No. 05 of 1996 for execution of the decree with the prayer for recovery of possession as well as mesne profit. In the execution case, the Survey Knowing Pleader Commissioner was appointed by the Executing Court for determination of mesne profits who submitted his report dated 17.05.2014 in the Executing Court giving details of mesne profits amounting to Rs.1,73,920/- holding that the plaintiff was entitled for mesne profits from the year 1986 to 2005. The defendant/petitioner coming to know about ex parte Commissioner's report, filed his objection in the Executing Court on 03.01.2016 stating therein that the decree holder was in peaceful possession over the land in question. The plaintiff has paid the entire consideration money. The defendant/petitioner further submitted that the report of Survey Knowing Pleader Commissioner was not based on factual aspect of the matter rather it was a report prepared at table and the decree holder/respondent 1st set was not entitled for mesne profit. The learned Executing Court did not consider the objections raised by the petitioner and vide order dated 16.01.2017 directed the judgment debtor to pay Rs.1,73,920/- to the decree holder as mesne profits.

3. Learned counsel for the petitioner submitted that the impugned order is not sustainable as it is illegal and has been passed without consideration of specific provision of law. The learned Executing Court has not considered the fact that it has got no jurisdiction to determine the mesne profit when there is no decree by the trial court on the basis of enquiry as laid down under Order 20 Rule 12 of the Code. The impugned order is not based on correct appreciation of the legal as well as factual aspects of the matter. The Executing Court passed the order for payment of mesne profits on the basis of report submitted by the learned Survey Knowing Pleader Commissioner but without taking into consideration the objection filed by the petitioner as it has been mentioned in the impugned order that judgment debtor has not filed any objection against the report which is evidently an error of record as the objection has been filed on 03.01.2016.

Learned counsel further submitted that the learned trial court while passing the ex parte judgment and decree has not passed decree for mesne profits as provided under Order 20 Rule 12 of the Code which is required to be passed after proper enquiry. Rather the learned trial court held that plaintiff is entitled for mesne profits for which he can obtain an order in accordance with law. But the decree holder, without proper adjudication on the point of mesne profits, filed an execution case for recovery of possession as well as mesne profits. The learned Executing Court exceeded its jurisdiction and appointed the Pleader Commissioner for determination of mesne profits and on the basis of ex parte report submitted by the Pleader Commissioner, passed the impugned order for payment of mesne profits. Learned counsel further submitted that it is well settled law that Executing Court is required to execute the decree as per the judgment and decree passed by the trial court and it is not allowed to make an enquiry for determination of mesne profits. However, the learned Executing Court, treating itself as trial court, determined the mesne profits on the basis of report of Survey Knowing Pleader Commissioner and hence, the said order is not sustainable in the eyes of law. The learned counsel further submitted that for recovery of mesne profit, the plaintiff could take recourse of law and in the light of the settled position of law, plaintiff was required to file a proper petition before the learned trial court and the learned trial court was required to appoint a Pleader Commissioner as provided under Order 26 Rule 10(B) of the Code and thereafter a decree was required to be passed under Order 20 Rule 12 of the Code.

4. The learned counsel referred to the decision of the Hon'ble Supreme Court in the case of Choudappa & Anr. Vs. Chaudappa since deceased by LRS. & Ors. reported in SLP (Civil) No. 3056 of 2023 wherein the Hon'ble Supreme Court held that the inquiry under Order 20 Rule 12 of the Code regarding future mesne profits is nothing but a continuation of the suit and is in the nature of preparation of final decree and as such, it cannot be said that any application moved as a reminder for completing the inquiry is barred by limitation or is liable to be dismissed on the ground of delay or laches when application was filed for determination of the mesne profits before the learned trial court. The learned counsel also referred to another decision of Hon'ble Supreme Court in the case of Shivshankar Gurgar Vs. Dilip reported in 2014(2) SCC 465 wherein the Hon'ble Supreme Court reiterated that the Executing Court must execute a decree as it is and it cannot go beyond the decree and has no jurisdiction to modify the same. Thus, the learned counsel submitted that the impugned order passed by the learned Executing Court is without jurisdiction and the error is apparent on the face of record that the learned Executing Court exceeded its jurisdiction and hence, the order is perverse and not sustainable and the same needs to be set aside.

5. On the other hand, the learned senior counsel appearing on behalf of the respondent 1st set vehemently contended that there is no infirmity in the impugned order and the same needs to be sustained. Learned senior counsel

submitted that the ex parte decree had made it clear that the plaintiff could get the mesne profits taking recourse to the process of the Court. Accordingly, the plaintiff moved before the learned Executing Court for calculation of the mesne profits and thereafter, payment of the amount to the plaintiff. The learned senior counsel further submitted that the petitioner has wrongly claimed that delivery of possession was given to the plaintiff in the year 1988. As the plaintiff did not get the possession, he filed an execution case bearing No. 05 of 1996 and in the meantime delivery of possession was given to the plaintiff on 13.05.2005 and for this reason the plaintiff was entitled to get mesne profit from 1986-2005. The learned senior counsel submitted that there is no bar on appointing a Survey Knowing Pleader Commissioner for assessment and determination of the mesne profit and the Survey Knowing Pleader Commissioner was rightly appointed who submitted his report and calculated the mesne profit of Rs. 1,73,920/- from year 1986-2005 when the defendant was given the possession. The appointment of Survey Knowing Pleader Commissioner has been made under provisions of Order 20 Rule 12 of the Code wherein it has been provided for an enquiry to be made for determination of mesne profits. The learned senior Counsel for the respondent further submitted that the enquiry for determination of mesne profit could even be ordered by the Executing Court and it is not necessary for the decree holder to move before the trial court in each and every case. Thus, the impugned order is perfectly legal and proper.

6. The learned senior counsel referred to the full Bench decision of the Madras High Court in the case of Babburu Basavayya and Ors. Vs. Babburu Guravayya and Anr. reported in AIR(38) 1951 Madras 938 wherein the full Bench in paragraph 8 held the decree holder was not required to specifically ask for any relief in respect of future profits, the prayer for general relief being sufficient to enable the Court to award him such profits. The full Bench further held that when the Legislature has expressly empowered the Court to grant relief for future mesne profits, that is to say, in respect of a cause of action arising subsequent to the suit, there is no reason to circumscribe this power by importing a qualification that there must have been a specific prayer in the plaint for the recovery of such unascertainable & unpredictable profits. Future mesne profits could well be awarded as part of the general relief to which a plaintiff is entitled. The learned senior counsel further relied on the aforesaid decision on the point that enquiry into future mesne profit can be exercised even at the later stage of the suit after passing of the preliminary decree. The learned senior counsel further referred to another decision of Madras High Court in the case of T.S. Swaminatha Odayar, lately a minor Vs. T. S. Gopalaswami Odayar and Ors. reported in AIR 1939 Madras 81 on the same proposition. Thereafter, the learned senior counsel referred to a full Bench decision of Patna High Court in the case of Indradeo Prasad Singh and Anr. Vs. Sheonath Prasad Singh and Ors. reported in AIR 1980 Patna 201 wherein it has been held that a plaintiff can pray for an enquiry into the profits realized by the defendants at the stage of the preparation of the final decree though such prayer had not been made in the

plaint, nor such direction has been given in the preliminary decree. Learned senior counsel referred to a decision of Hon'ble Supreme Court in the case of Kattukandi Edathil Krishnan & Anr. Vs. Kattukandi Edathil Valsan & Ors. reported in AIR 2022 SC 2841 wherein the Hon'ble Supreme Court held that there is no limitation for initiating final decree proceedings however, such practice needs to be discouraged and once preliminary decree has been passed by the trial court, it should proceed in the case for drawing up the final decree suo motu. The decision has been referred by learned senior counsel for drawing the analogy for calculation of mesne profits. Thus, learned senior counsel submitted that there is no infirmity in the impugned order and the same needs to be sustained.

7. I have given my thoughtful consideration to the rival submission in the light of the facts and circumstances of the case. The short question before this court is whether the initiation of proceeding for calculation of mesne profit before Executing Court and consequent orders of the learned Executing Court is within jurisdiction of the Executing Court. The issue revolves around the decree which reads as under:-

"The suit has been decreed ex parte against the defendants. The defendants are ordered to remove their title from the Schedule 'A' property within a month and handover the title to the plaintiff otherwise the plaintiff would be entitled to get the title through the process of the court at the cost of the plaintiff. Further the plaintiff could recover the mesne profit of Rs.7950/- through the process of the Court."

Apparently, the claim of the plaintiff is that he was not handed over the possession within one month in terms of the decree and has been handed over the possession only after execution of the Execution Case in the year 2005 and thus he is entitled for the mesne profit from the date of institution of suit till the delivery of the possession to him. Thus, the plaintiff has been claiming the mesne profits from the date of institution of suit till delivery of possession and this claim requires enquiry under Order 20 Rule 12 of the Code. Order 20 Rule 12 of the Code reads as under:

"12. Decree for possession and mesne profits.

(1)Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court

may pass a decree-

(a)for the possession of the property;

(b)for the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent;

(ba)for the mesne profits or directing an inquiry as to mesne profits;

(c)directing an inquiry as to rent or mesne profits from the institution of the suit until-

- (i) the delivery of possession to the decree-holder,
- (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or
- (iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry."

Plain reading of the provision shows the Court may pass a decree for possession of the property and for the mesne profits or directing an enquiry as to such mesne profits when a suit is filed for recovery of possession of immovable property and for rent or mesne profits. Now, it also appears from the reading of the provision that it is the same Court which passed the decree can direct enquiry as to rent or mesne profits from the institution of the suit until delivery of possession to the decree holder.

8. Hon'ble the Chief Justice Dawson Miller of the Patna High Court in the case of Ram Golam Sahu and Ors. Vs. Chintaman Singh reported in AIR 1926 Patna 218 observed as

"..... but by Section 244 of the old Code questions regarding the amount of any mesne profits as to which the decree had

directed an enquiry were to be determined by the Execution Court, whilst under the present Code of 1908 there is no such provision and the enquiry may take place either before the Trial Court itself, or in such manner as it: may direct, and a final decree must then it be passed in accordance with the result of the enquiry....."

Concurring with Hon'ble the Chief Justice, Justice B.K. Mullick held that the present Code has made it clear that the Court which passes a decree for possession of the land may direct an enquiry as to the mesne profits both prior to the institution of the suit and subsequent thereto up to the delivery of possession or up to three years whichever date is earlier.

9. In the case of Suvarn Rajaram Bandekar Discretionary Trust and Ors. vs. Armando Cardozo thr. LRS. & Ors. reported in 2017 SCC Online Bombay 7693 before the Bombay High Court Goa Bench learned Single Judge held that:-

"It is now well settled that the matter about grant of future mesne- profits i.e. from the date of filing of the suit till the delivery of possession are exclusively within the discretion of the trial court."

10. The Hon'ble Supreme Court in the case of reported in AIR 1967 SC 155, held that in the suit filed for recovery of possession of immovable property and for mesne profits, the provision of Order 20, Rule 12 of the Code are attracted to

the suit and the court has power to pass a decree in the suit for both past and future mesne profits.

11. The discussion of the aforesaid decision leads to irresistible conclusion that it is the trial court which has got the power to direct for and make an enquiry for determination of the mesne profits from the date of filing of the suit till recovery of possession in a suit for recovery of possession of immovable property. Therefore, the Executing Court cannot assume a jurisdiction which is not vested with it and it is trite to remind that the Executing Court cannot go behind the decree. It was required to execute the decree as it is. Determination of the mesne profit in terms of prayers of plaintiff/respondent no. 1 was not within the domain of the Executing Court and for this reason, I have no hesitation in holding that the learned Executing Court exceeded its jurisdiction and passed an order beyond its jurisdiction.

12. Hence, the impugned order dated 16.01.2017 is not sustainable and the same is set aside.

13. However, the plaintiff/respondent no. 1 is at liberty to take recourse of appropriate proceeding in accordance with law.