

(2004) 06 CAL CK 0068

In the Calcutta High Court

Case No : SAT No. 2254 of 2003 and CAN No. 8773 of 2003

Monmohini Coomer having proprietor of Coomer Construction Company and Others APPELLANT

Vs

Koley Properties (P) Ltd. and Others RESPONDENT

Date of Decision : 15-06-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5

Citation : (2005) 1 CHN 132

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : S.P. Roychowdhury, Jivan Ratan Chatterjee and Kartick Kumar Ray, for the Appellant; Sudish Dasgupta, Dipankar Chakraborty and Ashok Kumar Majumdar, for the Respondent

Judgement

Amitava Lala, J.—The second appeal arises out of a concurrent finding of facts in a dispute between landlord and tenant. However, appeal was admitted by a Division Bench of this Court on the grounds No. VI, X, XIV, XVI, XVII and XVIII. After admission of the appeal by the Division Bench an application for stay of the Title Execution Case No. 151 of 1986 was proceeded before a Single Judge of this Court and the applicant herein obtained an order of stay for a limited period which was extended from time to time. Today the date is fixed for final hearing of this application on affidavits exchanged by or between the parties herein.

2. Mr. S.P. Roychowdhury, learned senior Counsel, appearing on behalf of the appellant/tenant contended before this Court that when the appeal has been admitted by a Division Bench of this Court the order of stay is virtually automatic. Therefore, there is hardly anything to speak out in respect of grant of such order. However, as the cause of action for a mesne profit will arise on the eviction decree and when the Title Execution Case is yet to be heard it is an appropriate circumstance that the order of stay is to be formally passed in the instant case. He cited Mool Chand Yadav and Another Vs. Raza Buland Sugar

Company Limited, Rampur and Others, , to establish judicial approach requires that during the pendency of the appeal the operation of an order having serious civil consequences must be suspended. More so when appeal is admitted.

3. Mr. Roychowdhury frankly and fairly confessed before this Court that such order could be passed on condition. For an example, he contended that amount of rent can be enhanced with a direction upon the appellant/tenant to pay the same to the respondent/landlord on the terms that the same will be adjusted in future on account of mesne profit so that the interest of the respondent could not be prejudiced.

4. Mr. Sudhis Dasgupta, learned senior Counsel, appearing on behalf of the respondent/landlord contended before this Court that the premises No. 11, Convent Road, Kolkata which is under occupation of the tenant is a very valuable property in the city. Total area of the premises comprises of about 2 bighas and 10 cottahs with structures thereon. A part of the area used as an office of a firm of M/s. Coomer Construction, of which the appellant was the proprietor, for storing materials for construction and other a part used for residence. The tenant inducted several sub-tenants in this premises without consent of the landlord. From the inspection book it is revealed that a sum of Rs. 9290/- per month is recovered by such tenancy as against the original rent and municipal tax payable by the appellant/tenant to the respondent/landlord amounting to Rs. 264.69/- and Rs. 48.56/- respectively at a very old rate. Therefore, although the objection as to the question of stay is a very formal one but for the special circumstances he is bound to oppose this application. However, he made three objections. Firstly, there should not be any stay as there is no suffering of the appellant/tenant because his own case is that the premises was sub-letted to various parties. Therefore, no balance of convenience is supporting the cause of stay in favour of the appellant/tenant. Secondly, if at all any stay order is granted the same will be conditional about deposit of rent collected from the true sub-tenants. A rough idea has been given on the basis of the copy of the inspection book with effect from March, 1996-1997 about collection of Rs. 9290/- per month which also by a rough estimate is about 1 lakh or more per year at the rate of 1996-97 admittedly. Thirdly, there should be an ascertainment of the mesne profit when by virtue of a decree the possession of the appellant/tenant becomes wrongful. He cited a Division Bench judgment of this Court reported in 1991(2) CHN 198, Jagat Narayan Singh v. Rabindra Mohan Bhandari and Ors., to establish that when the contractual period has come to an end and there is a decree passed in favour of the landlord it would be unfair and unjust to allow the judgment-debtor to continue at the old rate depriving the market rate to the decree-holder. It would be allowing to a party to be unjustly enriched at the cost of the other. In coming to a conclusion Mr. Dasgupta explained the meaning of mesne profit as per Section 2(12) of the Code of Civil Procedure. "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 by the person in wrongful possession.

5. However, in reply, learned Counsel appearing on behalf of the appellant/tenant added one line of argument by saying that Section 8 of the West Bengal Premises Tenancy Act gives an indication about the fair rent and when the appeal is a continuance of proceeding the principle of fair rent will be applicable in the present case.

6. I have carefully considered the arguments advanced by both the parties. I feel that the order admitting the appeal on certain points with a direction to call for the Lower Court Records implies the stay of operation of the order and/ or proceedings in connection thereto in the Court below. On the other hand it can be construed that there cannot be any objection in proceeding with the execution case in the Court below in spite of preferring an appeal when no formal stay order is passed. However, since the appeal has been admitted to be heard out on certain points by a Division Bench of this Court it is desirable that no step should be taken in the execution proceeding until and unless further order is passed by this Court because in case ultimately the Second Appellate Court reverses the decree and/or order passed by both the Courts below, question of redelivery of the possession will arise. But that does not necessarily mean that in the present circumstances no condition will be imposed. Balance of convenience prescribes that the interim order of stay will continue subject to the following conditions:

(a) Lump sum amount of Rs. 5 lakh on account of rent is to be deposited by the appellant/tenant to the respondent/landlord within a period of one month from the date of communication of this order;

(b) for the purpose of ascertainment of the mesne profit Advocate-Commissioner/s Mr. Asok Das Adhikary and Mr. Aniruddha Chatterjee are appointed as with a consolidated remuneration of 500 G.Ms, each and other incidental costs and expenses including conveyance for the purpose of ascertainment of rental market value of the premises with the able assistance of a valuer to be appointed by them at the cost and expenditure of the respondent and the report will be submitted to this extent before this Court;

(c) the appellant/tenant will file the informal paper book within a period of one month from the date of communication of this order irrespective of coming of the Lower Court Records. In any event, Lower Court Records will also be brought within such period as aforesaid. Immediately after coming of the records and receiving the notice, informal paper book will be compared with the original Lower Court Records within a period of seven days from such notice.

7. Liberty is given to mention for early hearing.

8. Thus, the application stands disposed of. However, no order is passed as to costs.

9. Let an urgent xeroxed certified copy of this judgment, if applied for, be given to the Learned Advocates for the parties within two weeks from the date of

putting the requisites.