

(2018) 07 CAL CK 0137
In the Calcutta High Court
Case No : C. O. No. 2200 of 2018

SAJ Food Products Private Limited

APPELLANT

Vs

Sri Prasanta Sen

RESPONDENT

Date of Decision : 23-07-2018

Acts Referred:

Code of Civil Procedure — Order 41 Rule 5, Order 9 Rule 13

Citation : (2018) 07 CAL CK 0137

Hon'ble Judges : SABYASACHI BHATTACHARYYA, J

Bench : Single Bench

Advocate : Jaydeep Kar, Ayan Banerjee, Dinabandhu Dan, Aniruddha Chatterjee, Siddhartha Banerjee

Final Decision : Disposed Off

Judgement

The contention raised by the defendant in a suit for eviction, mandatory injunction, permanent injunction and mesne profits, is that the trial court, by the impugned order, directed the defendant/petitioner to pay Rs.2,50,000/- (Rupees two lakh and fifty thousand) only per month to the plaintiff/opposite

party during pendency of the eviction suit by way of occupation charges. It is argued by learned senior advocate appearing for the petitioner that the

court below had no jurisdiction to direct mesne profits to be deposited during pendency of the suit in the garb of occupation charges, since the grant of

mesne profits is a subject matter in the suit itself and could not be decided before final adjudication of the suit.

Such contention is controverted by learned counsel for the opposite party on the premise that since there is no specific provision to either grant of such

mesne profits during pendency of the suit nor any prohibition to do so, the court below was entitled, under its inherent powers, to grant such mesne

profits for the ends of justice. It appears that, upon hearing both sides, the plinth of the prayer of the plaintiff/opposite party for occupation charges

was an agreement entered into between the parties, which the plaintiff himself claims to have been terminated. Such claim is one of the bases of the

suit itself. As such, the claim of occupation charges of the opposite party could not, in any event, be allowed on the basis of such agreement, which the

plaintiff/opposite party himself claims to have been terminated.

The only form in which such occupation charges could, if at all, be granted would be as mesne profits. However, mesne profits have been claimed as

a relief in the suit itself and could not be granted before hearing the parties and prior to evidence being adduced on that score. A full-fledged

adjudication would be required to decide whether the plaintiff/opposite party was entitled to any mesne profits and, if so, what would be the quantum

of such mesne profits. Such imposition of mesne profits could not be pre-judged before hearing the parties on evidence and trial of the suit.

Certain judgments hold the field with regard to deposit of occupation charges during pendency of appeals against eviction decrees. However, in such

cases, the appellate court was within its jurisdiction to grant occupation charges as a condition for passing a stay order, as contemplated under Order

XLI Rule 5 of the Code of Civil Procedure. De hors such prayer for stay, there is some doubt as to whether occupation charges could be granted at

all during pendency of the suit.

Learned counsel for the opposite party cites certain judgments on this aspect. It appears that the last three judgments of this Court and a judgement of

the Hon'ble Supreme Court, as cited by the opposite party, would suffice to represent the present legal position in the matter, at least as far as this

Court is concerned.

A judgment reported at 2014 (2) CHN (CAL) 405 (Kanak Projects Limited Vs. Oil and Natural Gas Corporation Limited), was cited on behalf of the

opposite party, where a co-ordinate bench of this Court held, inter alia, that if the trial court found that there was absolutely no defence that the

defendant had to the claim for eviction made by the plaintiff and that eviction would be a matter of course, it could apply the principles of Atma Ram

Properties (P) Ltd (supra) for award of interim mesne profits pending passing of the final decree. It was further held that that was more the need

when the case was pending for a long time. In such judgment, the learned Single Judge permitted grant of mesne profits during pendency of the suit itself.

In another judgment passed by a different co-ordinate bench, reported at 2016 SCC OnLine Cal 5489 (K. K. Saha and Co. Pvt. Ltd. Vs. Ashok

Agarwal), the learned Single Judge differed from the view expressed in Kanak Projects Limited (Supra) and came to the conclusion that the court did

not have power to grant mesne profits during pendency of the suit till the issue was finally decided in the suit. The learned Single Judge went on

further to refer the matter, in view of conflict of decision, to a larger Bench by formulating the following questions for reference :

“Whether the Civil Court can direct the tenant to pay the occupational charges, damages, mesne profits during pendency of the eviction proceeding

at the prevalent market rate in excess of the contractual rent?”.

Such reference was answered by a Division Bench of this Court in a judgment reported at (2018) 1 CHN 497 (K. K. Saha & Co. Pvt. Ltd. Vs.

Ashok Agarwal). Such reference was, upon a discussion of the ratio involved, answered in the negative by holding that the trial court cannot pass any

direction upon the defendant/tenant for payment of damages during pendency of the suit. Upon a special leave petition being taken out against the

order of the Division Bench, the Hon’ble Supreme Court, vide order dated February 9, 2018 passed in Special Leave Petition No. 25607 of 2017,

disposed of such special leave petition, permitting the petitioner therein to move the High Court so that the High Court may determine whether the said

Rent Act was applicable and in case the same was not applicable, the High Court might further consider the matter in accordance with law.

It was made clear, however, that the Hon’ble Supreme Court had not expressed any opinion on the merits of the case. In such view of the matter,

the said question is open for reference yet again. Upon a perusal of the materials on record and hearing both sides, this Court is in agreement with the

proposition upheld by the Division Bench in K. K. Saha and Co. Pvt. Ltd. (Supra). Since the plaintiff in the present case has claimed mesne profits as

a relief in the suit itself, at the exact rate at which he claimed current occupation charges, the trial court pre-judged such issue at an interlocutory stage

in granting occupation charges (read mesne profits) at such rate without an

adjudication on trial. As to arrear occupation charges, the plaintiff/opposite party relied on an agreement, which the plaintiff himself claims to have terminated at the plaintiff's behest. As such, it would not lie in the mouth of the plaintiff to make such claim in terms of the said agreement. Moreover, the trial court had no authority to grant mesne profits during pendency of the suit when the matter itself was sub-judice in the same action. Although the trial court has power to grant occupation charges as condition of stay under Order XLI Rule 5 of the Code, and it could be argued that even in actions in the nature of Order IX Rule 13 of the Code of Civil Procedure challenging a decree of eviction, such occupation charges could be prayed for as condition of stay, without such decree being passed or any challenge to the decree having been taken out, it would be beyond jurisdiction of the trial court to grant such mesne profits in the garb of occupation charges even before the suit reaches its logical conclusion.

In such circumstances, this Court is of the opinion that the present revisional application ought to be sent to the Hon'ble the Chief Justice for being assigned, to be clubbed along with the matter, already pending reference, for the purpose of answering the question, which was referred by the learned Single Judge in K. K. Saha and Co. Pvt. Limited (supra), being â?? Whether the Civil Court can direct the tenant to pay the occupational charges, damages, mesne profits during pendency of the eviction proceeding at the prevalent market rate in excess of the contractual rentâ??.

Accordingly, let C. O. No. 2200 of 2018 be sent to the Hon'ble the Chief Justice for being assigned before the referee court to be heard along with C. O. 3777 of 2016 (K. K. Saha & Co. Pvt. Ltd. Vs. Ashok Agarwal). In view of sufficient prima facie case having been made out in this revisional application, there will be an order of stay of operation of Order No. 10 dated June 26, 2018 passed by the Civil Judge (Senior Division) at Sealdah, District- North 24-Parganas, in Title Suit No. 91 of 2017 till disposal of the revisional application.

It is made clear that this order will not operate as a stay of all further proceedings of the said suit and the trial court would be free to proceed with the suit in accordance with law. Liberty to the petitioner to mention the matter upon such reference being answered.