

IN THE COURT OF THE PRINCIPAL CIVIL JUDGE
& JMFC, AT: BELAGAVI.

Present: Shri. Shridhar.M.,
B.A., LL.B.,
Prl. Civil Judge & JMFC., Belagavi.

Dated: This, the 29th day of September, 2016.

F.D.P. No. 9/2011

1. Sri. Raghuveer Prabhakarlal Kalwar,
Age: 45 years, Occ: Advocate,
R/o: C.T.S.No. 1916 (Plot No.75),
Azad Co-Op. Housing Society,
Radhe-Krishna Marg,
Dajiba Desai Road, Hindalga,
Belgaum-591 108 and others.

... **Petitioners/Applicants**

(By Sri. D.S. Kulkarni, Adv.)

V/s

1. Mr. Ahmed Karabhai Khoja,
Age: 64 years, Occ: Business,
C.T.S.No. 3957/158+159,
Kali Amrai, (Behind Rex Theatre),
Belgaum.

(By Shri. S.D. Patil, Adv.)

.....Respondent/Opponent

I.A. No. VII

1. Sri. Ahmed.K.Khoja,
R/o: Belagavi.

... Defendant /Applicant

V/s.

1. Sri. Raghuveer.P.Kalwar
and others.

....Plaintiff/Respondent

ORDERS ON I.A. No. VII

The Respondent through his counsel filed I.A. No. VII U/Sec. 151 of C.P.C. for recall attachment order passed against him by taking bank guarantee as security for the mesne profits to be decided in the present petition.

2. In the sworn affidavit, the Respondent has contended that, in this case this court has attached the property C.T.S.No. 3957/158 and No. 3957/159, though it is not a suit property, it belongs to the children of Respondent, as they have purchased the same and Respondent has no concern over the said property. The children of the Respondent are not the parties to the present proceedings

hence, if the attachment order of the above detailed property is not belonging to the Respondent is confirmed, it adversely affects the rights of his children.

3. It is further contended that, question of mesne profit is to be decided and after quantum of mesne profit is conclusively decided by this court, is ready and willing to honour the said order and he already deposited part of amount and for remaining amount he is ready to given bank guarantee, therefore, it is necessary to release the said properties from the attachment fastening the responsibility of payment on him. If the application is not allowed, the Respondent will put to great hardship. Hence, prayed to allow the same.

4. Whereas, the petitioner herein has filed objections through his counsel and denied the grounds urged in the sworn affidavit and further contended that, prima-facie a bank guarantee should serve the purpose of security payment of mesne profit etc., therefore, petitioners have no objections to any principle to accept a bank guarantee of any local branch of State Bank, whereby the guarantor bank offers or furnishes an irrevocable unconditional guarantee that it would pay

mesne profit which includes interest there on as and when the same is eventually determined by this court or by the Appellate court in the event of any appeal is being preferred. However, opponent has not come up with the draft terms and conditions of the bank guarantee he has proposed to offer in his application. Therefore, it is in the absence of draft terms and conditions of the bank guarantee which guarantor bank is ready and willing to offer, neither this court nor the petitioner would be in a position to consider and final decision as to whether bank guarantee which opponent proposed to offer as to whether bank guarantee which the opponent proposed to offer would legal, factual and sufficiently secure the petitioner's interest so as to raise the attachment of the opponent property ordered by this court dated 31/10/2011. Hence, prior to passing final order on this I.A., issued direction to the opponent to furnish draft terms and conditions which the proposed guarantor bank is ready and willing to offer in order to enable the petitioner and this court to take considered and final decision either accepting or rejecting the bank guarantee proposed to be offered by the Respondent herein in the interest of justice. Hence, subject to it was

condition attachment order can be recalled if the bank guarantee finally offered by the Respondent and bank is accepted.

5. In this case the advocate for the petitioner submitted his written arguments. Heard the advocate for the Respondent.

6. On going through the rival contention of the parties, the following points arise for my consideration:-

POINTS

1. Whether the Respondent made out sufficient grounds for recalling the attachment order by receiving bank guarantee as security for determining the mesne profits in the present petition?

2. What order?

7. My findings to the above points are as under:-

Point No.1:- In the Affirmative.

Point No.2:- As per the final order for the

Following:-

:REASONS:

8. **POINT No.1:-** The Respondent has filed instant petition seeking for offer bank guarantee as security for mesne profit to be decided in the present case in respect of suit property and therefore, prayed to recall attachment order issued against the property bearing No. 3957/158 and 3957/159.

9. The petitioner has filed objections and also contended that, subject to obtain final decision for accepting or rejecting bank guarantee if the draft terms and conditions are proposed guarantor bank is ready and willing to offer, then pass suitable order for recall the bank guarantee based upon the final offer by the Respondent and accept the bank guarantee.

10. In the sworn affidavit, Respondent has contended that, property detailed above already attached it pertains to his children and he is no way concerned to the said property and he is ready and willing to pay the arrears of mesne profit determined by this court or Appellate court in respect of suit

schedule property. Hence, prayed to recall the attachment order passed in respect of said property.

11. On going through the materials available on record, present petition filed by the petitioner against the Respondent herein seeking for mesne profits from 1/10/1999 till 21/3/2011 with interest at 18% P.A.

12. On going through the materials available on record, it is pertaining to note that, original suit in O.S. No. 893/1999 was filed by the petitioner herein on 2/12/1999 seeking for possession of the suit schedule property from the hands of Respondent so also for mesne profit. The said suit came to be decreed on 31/1/2009 wherein it was ordered to hand over the vacant possession of the suit schedule property to the plaintiffs within two months from the date of the said order and directed the defendant to pay the mesne profits at the rate of Rs. 2,000/- P.M. from the date of institution of the suit till actual mesne profit is determined U/o.20 R. 12 of C.P.C. by holding separate enquiry in that respect. As per

averments made in the petition itself, petitioner has admitted that, in execution petition No. 632/2011 the petitioner herein has secured the vacant possession of the suit schedule property from the hands of Respondent on 21/3/2011. Thereafter he filed the present petition for determination of mesne profits from the date of suit till handing over the possession of the same with interest at 18% P.A. During the pendency of the present petition, by virtue of order dated 31/10/2011 by the then predecessor in office has attached the property detailed above. Thereafter said order has been challenged by the Respondent by preferring W.P. before the Hon'ble High court of Karnataka in WP No. 67577/2011 and the same came to be dismissed as not maintainable. Thereafter in order to vacate the judgment order passed by this court on 31/10/2011 the Respondent came up with the instant applicant. Though the petitioner has filed objections he permitted to recall the attachment order by obtaining sufficient bank guarantee. It is pertinent to note that, one of the parties have discussed what will be the probable mesne profit accrued so on is not made mentioned in their contention. No doubt, in the judgment and decree passed in

original suit was ordered to pay the interim mesne profit at Rs. 2,000/- PM from the date of suit till determining the actual mesne profit and no doubt, present petition is still pending for determining the mesne profit.

13. No doubt, petitioner as per zerox copy of the plaint averments furnished in the file claimed mesne profit at Rs. 15,000/- PM in the original suit. But the court while passing preliminary decree granted the interim mesne profit at Rs. 2,000/- p.m. as stated above. At this stage, suit property is commercial property and situated in the prime place is not in dispute. Considering the nature of the petition and interim mesne profit ordered by my predecessor in office, at this stage subject to modify after determining the mesne profit on appreciating the material available on record in the final order fix the approximate mesne profit for the purpose of disposal of the instant I.A is very much necessary. At this stage, subject to determine the mesne profit for the period about 12 years with interest, if direct the Respondent to furnish the bank guarantee for sum of Rs. 5,00,000/- for recall the attachment order, it will meet the ends of justice. Otherwise, the

petitioner who run the case all along in original suit as well as the F.D.P. will put hardship and loss.

14. It is pertaining to note that, Respondent is ready to offer bank guarantee and petitioner is ready to accept the same subject to certain condition on issuing an irrevocable bank guarantee pertaining to the State Bank, the Respondent shall execute the irrevocable bank guarantee of Rs. 5,00,000/- in favour of petitioner herein subject to get renewed the same for time to time till further order of present petition. If the Respondent furnishes an irrevocable bank guarantee of Rs. 5,00,000/- before this court subject to renewal after lapse of its validity from time to time then attachment order issued dated 31/10/2011 stands recalled. Hence, I.A. filed by the Respondent is deserves to be allowed. **Hence, point No.1 is answered in the Affirmative.-**

15. **POINT No.2:-** For the findings given to points No.1, this court proceed to pass the following:-

ORDER

I.A. No. VII filed by the Respondent U/Sec. 151 of C.P.C. is hereby allowed with cost of Rs. 200/-.

The Respondent is directed to furnish an irrevocable bank guarantee of Rs. 5,00,000/- pertaining to the State Bank of India subject to renew the same from time to time till further order. If the Respondent furnishes bank guarantee as such, within 30 days from the date of this order, the attachment order passed by this court on I.A. No. II dated 31/10/2011 for attaching the property C.T.S.No. 3957/158 and 3957/159 stands recalled.

For compliance by 28.10.2016.

(Dictated to the Stenographer, typed by her, transcript corrected by me and then pronounced in the open Court on this 29th day of September, 2016).

Sd/-
(Shridhar.M)
Prl.Civil Judge & JMFC, Belagavi.