

Ej. Ex. Case No. 46 of 2017
CNR No. WBPS01-000397-2017

Order No. 47

Date: 08.09.2023

Today is fixed for hearing of the petition dated 03.01.2023 filed by the decree holder u/s 141 r/w section 151 of CPC.

Both sides have filed their respective haziras.

The decree holder by filing the above petition submits that the decree holder being plaintiffs filed Ej. Suit No. 6763 of 2014 against the judgment debtor and obtained exparte decree on 15.09.2016. The decree holder specifically took the plea in the original ejectment suit that the defendant/ judgment debtor are running their business in the decretal premises and they even neglected to pay the monthly rent of Rs. 605/- per month to the landlord and finally got exparte decree against them. It is the contention of the decree holder that the decretal premises is having an area of 830 sq. ft. of land situated by the side of the main road and the judgment debtors are not paying any amount in respect of their possession even after passing of the exparte decree against them and considering the location of the decretal premises and the present market value they are required to pay occupational charges and mesne profit and damages amounting to Rs. 38,000/- per month for the enjoyment of the decretal property from the date of the decree towards the decree holder.

The Ld. Advocate for the decree holder put reliance on the decisions reported in **2005 (1) SCC 705** and the decision of the Hon'ble Calcutta High Court in C.O. No. 2262 of 2022 in support of their contention.

The judgment debtor has raised vehement objection against the said petition by stating that the application is not maintainable in the eyes of law and the amount of rent specified by the decree holder and the measurement of the decretal property are all fictitious and has no basis and the decree holder is proceeding with the instant execution case in uninterrupted manner and, as such, he is not entitled to get any relief under the present petition.

Heard both sides.

Perused the materials on record.

Considered.

It is admitted fact that Ej. Suit No. 6763 of 2014 was decreed exparte in respect of which the instant execution proceeding is going on. On perusal of the certified copy of the decree it is found that though exparte decree for eviction of the judgment debtor was passed in favour of the decree holder but no decree for mesne profit or damage was passed under the said ejectment suit.

It is settled law that if the exparte decree is put in execution as has been done in the present case and the said decree is challenged under the provision of Order-9, Rule-13 of CPC or u/s 47 of CPC as the case may be, then in such a case proceeding with the execution of the exparte decree would frustrate the proceeding under which the exparte decree has been challenged and there are catena decisions where it has been held by the Hon'ble Courts to withhold the execution process till the disposal of the proceedings by which the decree under execution has been challenged. But at the same time if the decree under execution is automatically stayed the same will cause prejudice to the decree holder for which the decree holder can be awarded occupational charges since the date of the passing of the decree in his favour from the judgment debtor during the pendency of their proceedings to enjoy an order of stay. Needless to say that the decisions relied upon by the decree holders are also in consonance with the above principle.

However, in the present case, it is noticed that the decree holder has brought the instant execution proceeding in accordance with law and as the decree could not be executed by the Court Bailiff an application u/O-21, Rule-97 of CPC has been filed by the decree holder an evidence has also been partly recorded in the said case. On perusal of the case record, this Court has not come across any application from the side of the judgment debtor seeking any order of stay over the execution proceeding, and, as such, there is no hindrance in front of the decree holder as of now to proceed with the execution proceeding in accordance with law so as to award occupational charge upon the judgment debtor right at this moment.

Moreover, the decree holder has prayed for an amount of Rs. 38,000/- per month as mesne profit though no decree for mesne profit or damage has been passed under the original ejectment suit.

The original ejectment suit having been decreed against the judgement debtor as tenant, the cause of action for claiming mesne profit does not accrue when the suit is filed for eviction by giving notice (**Bhartia Electric Steel Co. Vs. Buddha Dev – 2006 Vol. 2 CHN 1 relied upon**). But from the date of decree of eviction, the possession of the defendant in the tenanted premises becomes illegal and for the same the plaintiff may be entitled to get a decree for mesne profit which can be realized in a separate proceeding in terms of Order-20, Rule-12 of Code of Civil Procedure after payment of adequate Court Fees.

However, in the present case, no separate proceeding Under Order-20, Rule-12 of CPC has been initiated and the decree holder could not substantiate the amount claimed to the tune of Rs.

38,000/- per month under the present proceeding, and, as such, the petition claiming the said amount appears to be without any merit and hence rejected.

Hence, it is,

O R E R E D ,

That the application dated 03.01.2023 filed by the decree holder seeking occupational charge, mesne profit and damage is rejected on contest at this stage.

Fixing 20.11.2023 for awaiting order of the Misc. Case No. 110 of 2018.

Dictated and corrected by me:

Judge

Smt. Sudipa Banerjee
J.O. Code : 01148
Judge, 3rd Bench,
Presidency Small Cause Court,
Calcutta.