

Present: Sri Srikumar Goswami
Judge, Commercial Court at Alipore.
Money Execution 6/2019

Order No. 4
06.02.2020

In the matter of :

An Application under Order
21 Rule 9 read with Section
39 of the CPC.

And

In the matter of :

Bhagwati Prasad
Jhunjhunwala & 5 ors.

Vs.

In the matter of :

UCO Bank & anr.

1. The Decree Holder files affidavit of service showing copy of service upon the Judgement Debtor. Let the same be kept in the record.
2. Decree Holder also files by firisty a xerox copy of the Judgement in the original suit/case in T.S-27/2009 alongwith other documents. Let the same also be kept in the record.
3. Regarding maintainability, the Decree holer referred the agreement between the parties dated 23.11.2001 to establish that originally, the premises was let out to the Bank for doing banking business.
4. The Ld. Counsel appearing on behalf of the Decree Holder also referred the order of the Hon'ble High Court at Calcutta in F.A. No. 48 of 2013 with C.A.N. 6797 of 2012 in which the Hon'ble Court has been pleased to observe:

“...We have scanned the plaint and we find that the plaintiffs have sought mesne profits in prayer (b). From a perusal of the judgment and decree it is apparent that the trial court has overlooked this prayer while directing the defendant to quit and vacate the suit premises...”

5. The Ld. Counsel also referred the order dated 29.09.2018 in Misc Case No. 08/2015 as passed by the Ld. Civil Judge (Sr. Div.), 1st Court at Alipore, in which the Ld. Court ordered:

“...Hence, it is

ORDERED

That the suit be and the same is decreed in final form so far as mesne profit is concerned, subject to payment of Court fees against the amount of mesne profit which stands at Rs. 4,65,55,821/- (Four croe sixty five lakhs fifty five thousands eight hundred and twenty one only).

Let the Commission report be made part of the final decree. The defendants/Jdr to pay mesne profits of Rs.4,65,55,821/- within 90 days from this day, in default, the decree holder shall be entitled to put the decree into execution.

Thus, the Misc Case stands disposed of...”

6. The Ld. Counsel further relied upon the Judgement of the Hon’ble Delhi High Court in *Jagmohan Behl Vs. State Bank of Indore* in *FAO (OS) No. 166/2016* (downloaded copy), in which the Hon’ble Delhi High Court observed:

“...17.The Supreme Court in Corporation of Madras Vs. M.K. Buhari (2000) 9 SCC 497 has held that mesne profit cannot be less than the rent payable in respect of the property given on rent. Mesne profits are in the form of damages which are payable by a person in wrongful possession. It protects the interest of the owner/landlord and is payable equivalent to the market rent by the person who has failed to deliver the possession and is holding

over the property [See Marshal Sons and Co. Ltd. Vs. Sahi Oritrans(P). Ltd.& Anr. (1999) 2 SCC 325]. Claim for mesne profit can be joined with a suit for recovery of immovable property under Order II Rule 4 of the Code and for this no leave of the Court is required. Order XX Rule 12 stipulates that when a suit is filed for recovery of possession and for rent or mesne profits, the Court may pass a decree for possession of the property. It can also pass a decree for mesne profits or direct an enquiry as to the mesne profits. Such enquiry can be from the date of institution of suit till delivery of possession to decree holder, relinquishment of possession by the judgment debtor with notice to the decree holder through court or expiration of three years from the date of decree, whichever occurs first. A decree of mesne profits under clauses (b) and (c) would be a final decree, which would be passed after the enquiry.

Lease of immovable property is dealt with under the Transfer of Property Act in Chapter V thereof. The said enactment vide section 105 defines what is lease, lessor, lessee and rent and vide section 107 stipulates how leases are made and can be terminated. Leases can be both oral or in writing. Noticeably, sub-clause (vii) to clause (c) in Section 2 of the Act does not qualify the word “agreements” as referring to only written agreements. It would include oral agreements as well. The provisions of the Transfer of Property Act deal with the effect of non-payment of rent, effect of holding over and most importantly the determination of the leases or their termination. It cannot be disputed that action for recovery of immovable property would be covered under sub-clause (vii) to clause (c) when the immovable property is exclusively used in trade or commerce. Read in this manner, we do not think that claim for recovery of rent or mesne profit, security deposit etc., relating to immovable property which was used exclusively in trade or commerce should not be treated as a commercial dispute in view of the language, ambit and scope of sub-clause (vii) to

clause (c) to Section 2 of the Act. These would qualify and have to be regarded as commercial disputes. The use of expression “any other relief pertaining to immoveable property” would mean disputes relating to breach of agreement and damages payable on account of breach of agreement would be covered under sub-clause (vii) to clause (c) to Section 2 of the Act when it is arising out of agreement relating to immoveable property exclusively used in trade and commerce...”

7. In view of the decision of the Hon’ble Delhi High Court, the present execution case is found maintainable in the present Court. Further, this matter can be taken up again if it is challenged by the Respondent/Judgement Debtor after their appearance.
8. To 20.02.2020 at 12.30 p.m. for further hearing and steps by the Decree Holder.
9. The Decree Holder is directed to file an affidavit whether any appeal or review application is pending in connection with the present matter before any appropriate forum.

Dictated and corrected by me,

Sd/-

Judge, Commercial Court at Alipore,
For South 24 Parganas, Purba Midnapore
and Paschim Midnapore.

Sd/-

Judge, Commercial Court at Alipore,
For South 24 Parganas, Purba Midnapore
and Paschim Midnapore.