



03.08.2022
Item No.07
Suman
Ct.42

S.A. 146 of 2019
With
CAN 3 of 2022
(This CAN not found)
With
CAN 4 of 2022

Messrs G. K. Sports
Vs.
Sri Sudhir Kumar Banerjee

Mr. S. Banerjee
Mr. Indranil Banerjee
..for the petitioner

Mr. Meghajit Mukherjee
Ms. Sweta Mohanty
Mr. Vidhya Bhusan Upadhyay
...for the defendant/O.P.

This is an application filed by the respondent in a disposed of second appeal making certain allegations to the effect that the second appeal was withdrawn by the appellant without serving any notice to the respondent ex parte. At the time of dismissal of the appeal since no notice was served upon the respondent, the learned advocate for the respondent could not apprise the Court that a huge amount of money towards occupational charges is due and lying outstanding as against the appellant on the date of dismissal of the appeal for non-



prosecution and by such dismissal of the appeal for non-prosecution, the respondent has suffered irreparable loss and injury.

The learned advocate for the opposite party/appellant, on the other hand, vehemently urges that the appeal was filed by the appellant. If the appellant does not wish to proceed with the appeal, he cannot be compelled for the same by any Court of law. It is the absolute right of the appellant either to continue or not to press the appeal before the second appellate Court. Dismissal of an appeal means automatically affirmation of the judgment and decree passed against the appellant by the trial Court and the First Appellate Court. Therefore, the respondent has no reason to be aggrieved against such order.

It is also submitted by the learned advocate for the appellant that the respondent can very well realize occupational charges by filing appropriate application before the Executing Court.

An order of occupational charges passed by the Appellate Court during the pendency of the appeal creates a legal fiction when such occupational charges are fixed at the higher rate than the rate of rent which was payable by the appellant /tenant at the time of determination of tenancy and institution



of the suit. The Executing Court can direct realization of the amount equivalent to the amount of rent at which rate it was paid by the tenant/appellant at the time of institution of the suit. Subsequent enhancement of occupational charges following the ratio of the decision passed by the Hon'ble Supreme Court in **Atma Ram Properties (P) Ltd. vs. Federal Motors (P) Ltd** reported in **(2005) 1 SCC 705** is not an executable order if subsequent to such direction an appeal is withdrawn without payment of such occupational charges, the respondent will surely suffer.

Therefore, this Court is inclined to hear the instant application at length. The opposite party/appellant is at liberty to file affidavit-in-opposition within 15 days from the date of this order and serve a copy of such affidavit-in-opposition to the learned advocate for the petitioner.

The petitioner is at liberty to file affidavit-in-reply, if any, within two weeks thereafter.

The instant application be listed for hearing on **16th September, 2022 at 2 P.M.**

(Bibek Chaudhuri, J.)

