



09.10.2023
Court-42
Item-04

S.A/146/2019
With
CAN 3 of 2022
With
CAN 4 of 2022

M/s G.K Sports
-Vs-
Sudhir Kumar Banerjee

For the appellant:

Mr. Probal Mukherjee, Adv.,
Mr. Debjit Mukherjee, Adv.,
Mr. Meghajit Mukherjee, Adv.,
Mr. Debdyut Mukherjee, Adv.,
Mrs. Susmita Chattejee, Adv.

For the O.P:

Mr. Suchit Kr. Banerjee, Adv.

Indisputably the applicant/plaintiff filed a suit for eviction by a decree for ejectment and mesne profits against the appellant/plaintiff in the court of the learned Civil Judge (Senior Division), 4th Court at Alipore being Ejectment Suit No.79 of 2004 which was subsequently renumbered as RC Case No.69 of 2006 under Section 6(1) of the West Bengal Premises Tenancy Act, 1997. The said suit was disposed of by passing a decree for eviction against the defendant/appellant. The judgment and decree passed by the High Court was assailed in appeal by the defendant/appellant which was registered as Ejectment Appeal No.47 of 2014. The said appeal was dismissed on contest. Against the concurrent finding by the High Court as well as First Appellate Court, the defendant filed a second appeal before this Court which was registered as SAT 12 of 2015.



The said appeal was admitted by the Division Bench of this Court by an order dated 2nd February, 2016 formulating a substantial question of law.

In the second appeal, the appellant filed an application praying for stay of operation of the decree passed by the trial court and formed by the first court of appeal which was registered as CAN 1428 of 2014.

After admission of appeal the respondent/applicant filed an application being CAN 3792 of 2016 inter alia, praying for occupational charges in respect of the tenanted premises from 31st January, 2008. The application for stay being CAN 1428 of 2016 and the application for occupational charges being CAN 3792 of 20016 were taken up for hearing together and by a composite order passed by the Hon'ble Indrajit Chatterjee, J. both the applications were disposed of directing the appellant to deposit monthly occupational charges at the rate of Rs.66,015/- from the month of August, 2016 and also an amount to the tune of Rs.39,76,200/- on account of arrears in occupational charges for the period from February 1, 2008 to July 13, 2016 in ten equal installments. The learned Registrar General, High Court, Calcutta was directed to open one recurring deposit account in any nationalized bank which will run for ten months from September 13, 2016 to July 12, 2017 wherein the current occupational charges and arrears of occupational charges may be deposited. It was further directed that after the account was closed, the entire amount along with interest will be kept in fixed deposit for one year which may be renewed on yearly basis till the disposal of the second appeal. It was also directed that if the order passed in CAN 3792 of 2016 is not complied with in



its letters and spirits, then the interim stay as granted by the Division Bench will automatically stand vacated.

The appellant changed the said order dated 26th July, 2016 before the Hon'ble Supreme Court by filing SLP (Civil) Nos.24890 to 24892 of 2016. The special leave petitions were dismissed upon hearing on 24th September, 2018. Subsequently, on the prayer made by the learned Advocate on behalf of the appellant the said appeal was listed under the heading to be mentioned in the supplementary list dated 11th June, 2019. On 11th June, 2019 the second appeal was dismissed as withdrawn by the appellant.

After a lapse of about two years and six months of dismissal of the appeal the respondent filed an application praying for recalling of ex-parte withdrawal order of dismissal dated 11th June, 2019 which was registered as CAN 4 of 2022. By filing CAN 3 of 2022 the respondent has prayed for passing necessary order calling upon the appellant to show cause why the opposite party should not be directed to furnish suitable security by way of bank guarantee and/or immovable properties valued not less than Rs.2 crores to the satisfaction of the learned Registrar General of this Court to cover up and liquidate the opposite party's liability to pay occupational charges/mesne profits which have accrued or will accrue in future due to non-deposit till delivery of khas possession of the decreetal property.

Thus, from the pleadings of the parties it appears that no decree for mesne profit was passed either by the trial court or the first appellate court. No cross appeal or cross objection was made by the respondent/applicant praying for a decree for mesne



profit. The order for occupational charges was passed as a conditional order for granting stay of operation of the decree passed by the trial court and the first appellant court. It is also on record that the second appeal was dismissed withdrawn. In view of such submission, is it possible for the court to pass any order directing the appellant to pay occupational charges as per the order dated 26th July, 2016?

The learned Advocate on behalf of the respondent/applicant submits that even if the second appeal has been dismissed, this Court is empowered to pass necessary order under Section 107 read with order 41 Rule 22 and order 41 Rule 33.

Section 107 of the CPC speaks about the powers of the appellate court-

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require such evidence to be taken.

Sub-Section (2) of Section 107 says that subject to the provision contained in Sub-Section (1), the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed, by the Code on courts of original jurisdiction in respect of suits instituted therein. Order 41 Rule 22 empowers the respondent to take out cross objection to the decree which he could have taken by way of appeal. Rule 33 of order 41 states that the appellate court shall have the power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may



be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

In the instant case there is no appeal pending. Therefore, the following question is formulated in order to dispose of the above mentioned applications-

- (i) In the absence of any appeal, can the appellate court pass any order/direction in the disposed of record?
- (ii) When the trial court and the first appellate court did not pass any decree for mesne profits and the plaintiff/respondent did not prefer any cross appeal/cross objection praying for decree for mesne profits, can the court after disposal of the second appeal direct the executing court to recover occupational charges in execution of decree for eviction?
- (iii) Can an order for payment of occupational charges on condition for an order of stay remains operational, and be enforced in execution of decree?
- (iv) Can the second appellate court after dismissal of the appeal, pass an order for realization of arrears and current occupational charges under the inherent power conferred under Section 151 of the CPC in the absence of a specific provision in the Code?



Both the applications be CAN 3 of 2022 and CAN 4 of 2022 shall be heard on the above mentioned points for consideration.

List the matter on available Friday under the heading 'application' two weeks after vacation.

(Bibek Chaudhuri, J.)