

**(2011) 12 CAL CK 0038**

**Calcutta High Court (Port Blair Bench)**

**Case No:** S.A No. 003 of 2011

Shri K. Chellaiah

APPELLANT

Vs

Shri Sasivarnam

RESPONDENT

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**Date of Decision:** Dec. 16, 2011

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 20 Rule 12

**Hon'ble Judges:** Prasenjit Mandal, J

**Bench:** Single Bench

**Advocate:** Anjili Nag, for the Appellant;

**Final Decision:** Allowed

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### **Judgement**

Prasenjit Mandal, J.

This second appeal is directed against the order dated March 22, 2011 passed by the learned Additional District Judge, Andaman and Nicobar Islands, Port Blair in the Other Appeal Nos. 36 of 2010 and 35 of 2010 thereby dismissing the O.A. No. 36 of 2010 and modifying the O.A. No. 35 of 2010 arising out of the judgement and decree dated October 14, 2009 passed by the learned Civil Judge, Senior Division at Port Blair in Other Suit No. 53 of 2004.

2. The short fact necessary for the disposal of this second appeal is mentioned below:

3. The plaintiff of the original title suit being Other Suit No. 53 of 2004 prayed for a decree of declaration of adverse possession over the suit property, a decree of declaration of possessory right over the suit property, permanent injunction and other reliefs against the defendant/appellant herein.

4. The defendant/appellant herein contested the said suit denying the material allegation raised in the plaint along with a counter claim against the plaint contending that the plaintiff was the tenant in respect of the suit property and he

was paying rent to the defendant, along with assertion of other rights against the plaintiff. The parties adduced evidence in support of their respective contentions and upon analysis of evidence, the learned trial Judge dismissed the title suit on contest. At the same time, the learned trial Judge granted the reliefs of the counter claim to the effect that the defendant do get a decree for recovery of Khas possession of the suit property by evicting the plaintiff therefrom. The plaintiff/tenant was also directed to deliver the peaceful possession of the suit property in favour of the defendant within three months from the date of the judgement and decree failing which, the defendant shall have the liberty to get the decree executed through the Court.

5. Being aggrieved by said judgement and decree, both the plaintiff and defendant filed two separate other appeals being Other Appeal No. 36 of 2010 by the plaintiff and the Other Appeal No. 35 of 2010 by the defendant respectively.

6. By the impugned judgment and decree, the first appellate court dismissed the Other Appeal No. 36 of 2010 filed by the plaintiff and allowed the Other Appeal No. 35 of 2010 filed by the defendant with modification. The learned first appellate court granted the relief in favour of the defendant/appellant herein to the effect that the defendant/appellant herein is further entitled to get a decree in terms of prayer No. (B) in the counter claim directing the plaintiff that he must pay the arrears of rent within two months from the date of receipt of the copy of the judgement and decree by the lower court, in default, the defendant/appellant herein shall have the liberty to realize the same by way of execution as per law.

7. Being not satisfied with such judgement and decree passed by the first appellate court, the defendant/appellant has preferred this second appeal which was admitted by this Hon"ble Court.

8. At the time of admission of the second appeal, this Hon"ble Court framed the following substantial questions of law for decision in the appeal:-

(1) Was the learned trial Judge right in decreeing the counter claim by the defendant in the suit without adjudicating the claim for damages as claimed in clause(c) of the counter claim"

(2) Was the learned appellate court right in not adjudicating the claim for damages as claimed in clause (c) of the counter claim in affirming the decree of the learned trial court when this was the specific grounds on which the appeal was preferred by the appellant namely, the defendant in the suit"

9. Upon hearing the learned advocate for the appellant and on perusal of material on record, I find that the appellant herein has claimed inter-alia damages by way of pendente lite and future rent @Rs. 1000/- per month till date. This relief was not at all considered by the learned first appellate court although there is evidence on record in this regard. By the order dated 06.07.2007, the learned trial judge directed

the plaintiff/respondent to deposit the entire arrears of rent pending since April, 1999. The plaintiff/respondent herein was further directed to deposit future rent @Rs. 2500/- per month. This was an interlocutory order with regard to the application filed by the defendant, but the judgment passed by the learned trial Judge does not reflect such reliefs. While disposing of the first appeal, the lower appellate court granted further relief to the effect that the appellant herein was entitled to get a decree in terms of prayer (b) of the counter claim which relates to recovery of arrears of rent. But the decree passed by the first appellate court is totally silent about mesne profits. For that reason this second appeal has been preferred.

10. While the PW-1 was cross examined on May 09, 2009, he admitted clearly that he had stopped making payment of rent to the defendant for the last one year. He admitted further that for the last 10 to 15 years, the defendant asked him to vacate the premises but he refused to do the same. In spite of the order of the court, he had not paid the rent to the defendant. The plaintiff further admitted that the neighbours of the locality had knowledge to the fact that the defendant asked him to vacate the suit property and he refused to do the same. Therefore, from the order dated 06.07.2007 and above admission of the plaintiff in his cross examination, it has been duly proved that the defendant/appellant herein is also entitled to get decree for mesne profits under Order 20 Rule 12 of the CPC. Both the courts below have failed to consider such reliefs and as such, I am of the opinion that the appellant herein is entitled to get a decree for mesne profits under Order 20 Rule 12 of the CPC from the date of institution of the suit till recovery of possession for which the defendant/appellant herein is entitled to lodge a separate proceeding. The appellant is also required to pay the adequate court fees over the quantum of mesne profits to be determined by the learned trial Judge. The substantial questions of law as framed in this second appeal are answered accordingly in favour of the appellant.

11. The second appeal is, therefore, allowed. The appellant do get a decree of mesne profits from the date of institution of the suit till the recovery of possession of this suit property under Order 20 Rule 12 of the CPC and for that reason, he shall have to pay additional court fees over the quantum of mesne profits to be determined by the learned trial Judge. The judgment and decree passed in Other Appeal No. 35 of 2010 is modified to this extent.

12. Urgent Xerox certified copy of this judgement be supplied to the parties, if applied for, after observing required formalities.