

(2012) 12 CAL CK 0039

Calcutta High Court

Case No: G.A. No. 2733 of 2012, A.P.O.T. No. 476 of 2012 and C.S. No. 276 of 1999

M/s. AIR  
Constructions and  
Consultants Pvt. Ltd.

APPELLANT

Vs

Smt. Reena Das

RESPONDENT

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Date of Decision: Dec. 11, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 5
- West Bengal Premises Tenancy Act, 1956 - Section 13(6)

Citation: (2013) 1 CHN 472

Hon'ble Judges: Shukla Kabir (Sinha), J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: Anindya Kumar Mitra, Mr. Krisna Raj Thakkar and Mr. Vinay Misra, for the Appellant; Jayanta Kumar Mitra, Advocate and Mr. Dhruba Ghosh, for the Respondent

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### Judgement

Ashim Kumar Banerjee, J.

This appeal would relate to a decree of eviction passed by the learned Single Judge as against the appellant in respect of the premises No. 8 Short Street Calcutta belonging to the respondent. The facts would depict, the parties entered into a development agreement on December 23, 1987 by which the respondent permitted the appellant to develop the property situated at No. 8 Short Street Calcutta comprising of an area measuring about 23 cottahs 10 chat tacks 40 square feet consisting of two old buildings, one being a two storied building in which the respondent was residing in the first floor. Under the agreement the respondent would hand over vacant possession of the premises in question to the appellant and the appellant would develop the said property by taking all necessary steps in this regard. As and by way of part performance, the respondent handed over the ground floor of the second storied building to the appellant. Under the agreement the appellant was to arrange for alternative accommodation of the occupants including

the respondent simultaneously on handing over of the entire vacant premises. The respondent alleged, despite handing over of the ground floor portion to the appellant the appellant took no step to develop the property. Hence they were liable to vacate the said premises. The appellant resisted the action on the ground, they were monthly tenant under the respondent at a sum of rupees five thousand per month. So long rents were payable they were entitled to retain possession and the suit was liable to be dismissed.

2. The learned Single Judge rejected the contention of the respondent. The principal purpose of the agreement, if read together as a whole, would amount to development of the property since the developer committed breach by not taking any step for development. They were not entitled to retain possession. His Lordship vide judgment and order dated July 30, 2012 passed decree of eviction as claimed in the suit. His Lordship appointed a Commissioner to ascertain the Mesne profits for the period the appellant retained possession despite termination of the agreement by the respondent. His Lordship further held, since adjudication of Mesne profit would take sometime the appellant would continue to pay at the rate of rupees thirty thousand per month. His Lordship enhanced the amount keeping in view the location of the property and the prevalent market rate of rent. The relevant paragraph of the judgment that would involve consideration in the foregoing judgment is quoted below.

However, having regard to the facts of the case and more importantly that the defendant has been in utter wrongful occupation of the said flat since 6 July 1998 the defendant must pay occupation charges to the plaintiff at a higher rate for its occupation of the said flat than the rate the defendant had paid under the said agreement. The defendant should not, in any event, be allowed to occupy the said flat and enjoy the same upon payment of Rs. 1,500/- only as the rates of rents or occupation charges of all the properties in the metropolis have gone up substantially over the years. The flat in question being situated in one of the most expensive areas in the metropolis, the defendant henceforth, i.e. from the month of August 2012, shall pay Rs. 30,000/- per month for the said flat as occupation charges to the plaintiff until the defendant hands over the vacant possession of the said flat to the plaintiff or until the decree for possession passed herein is satisfied.

3. Being aggrieved the appellant preferred the instant appeal along with an application for stay.

4. The decree was passed by the learned Single Judge in a suit for recovery of possession. Hence under the CPC the appeal was maintainable and the appellant was entitled to an order of admission of the appeal. Question would still remain as to whether the appellant would be entitled to an order of stay as a matter of course or the Court of appeal would be competent to impose terms upon the appellant for the purpose. On this limited issue we heard learned Advocate General appearing for the appellant and Mr. Jayanta Mitra learned senior advocate appearing for the

respondent.

5. The learned Advocate general contended as follows:-

i) Creation of tenancy was independent of the development agreement. The appellant was put in possession in September 1987 whereas the development agreement was entered into on December 23, 1987. Even if the agreement stood terminated wrongfully by the respondent such wrongful termination would have no effect on the tenancy, which was an independent contract between the landlord and the tenant.

ii) So long the tenant paid the rent the respondent was not entitled to eviction except on the ground provided in law.

iii) Termination of tenancy could only be effective on a valid notice of termination u/s 13(6) of the West Bengal Premises Tenancy Act duly served upon the tenant. Having not done so decree of eviction was liable to be set aside.

iv) The learned Judge framed issue being issue Nos. 2, 3 and 4 that were not answered by His Lordship. Hence the decree of eviction was liable to be set aside on the said ground alone.

v) Since the decree was ex-facie illegal and liable to be set aside the order of stay would be a matter of course.

vi) The Learned Judge Suo motto enhanced the amount of rent from rupees five thousand to rupees thirty thousand without appropriate material being available to His Lordship. Any increase by the Court of Appeal would also be illegal in absence of appropriate materials.

vii) Assuming the amount of rupees thirty thousand was not sufficient, in absence of a cross appeal by the respondent the Court of Appeal was not entitled to enhance the said amount that too at the initial stage of admission.

6. Elaborating his argument, learned Advocate General contended, as per the agreement he was supposed to pay rupees fifteen hundred as occupation charges and rupees three thousand five hundred as maintenance charges aggregating to rupees five thousand per month. The appellant did not commit any default in making payment of the said sum. Hence the decree of eviction was per se illegal and liable to be set aside. Any enhancement of the amount without any appropriate material was also liable to be set aside. Hence this Court should pass an unconditional order of stay coupled with a direction for expeditious hearing of the appeal. To support his contention learned Advocate General relied on the following decisions:-

i) [Punit Beriwalla Vs. Suva Sanyal and Another,](#)

ii) [Mool Chand Yadav and Another Vs. Raza Buland Sugar Company Limited, Rampur and Others,](#)

7. Mr. Jayanta Kumar Mitra learned Senior Counsel while opposing the appeal on behalf of the landlord respondent contended:-

i) The agreement entered into by the parties did entrust the appellant to develop the property. Having not done so, the appellant breached the condition warranting decree of eviction.

ii) Handing over of vacant possession of the building and/or the property was dependent upon arrangement of alternative accommodation that the appellant failed to provide. Hence the respondent could not hand over vacant possession of the entire premises.

iii) The development agreement was executed in 1987. Almost three and half decades passed in between the appellant did not take any step at all. Hence they were liable to vacate the premises in question.

iv) Handing over of part possession could not be construed as an independent tenancy, at least parties did not contemplate so as would appear from the letter of the appellant dated July 31, 1998 appearing at page 92-93 of the petition.

8. To elaborate his contention Mr. Mitra contended, the appellant was occupying a part of the premises merely as a licensee. Such licence. was created through the development agreement. Hence there could be no tenancy at all ever created in favour of the appellant. He further contended, mere payment and acceptance of rent would ipso facto not waive the right of the landlord to get recovery of possession in case of termination of the licence. He lastly contended, the Court of Appeal was always entitled to impose any condition that may be found deem fit and proper. Such power of the Court of Appeal could not be questioned.

9. To elaborate his argument Mr. Mitra cited the following decisions :-

i) Satguru Nirman Private Limited Pvt. Ltd. -Vs- Narayan Chandra Paul reported in 2003 1 Cal HCN 14.

ii) Atma Ram Properties Private Limited -Vs- Federal Motors Private Limited reported in 2005 Volume-I Supreme Court Cases page-705.

iii) [The State of Maharashtra and Another Vs. Super Max International Pvt. Ltd. and Others,](#)

iv) [Sarup Singh Gupta Vs. S. Jagdish Singh and Others,](#)

10. While replying the learned Advocate General distinguished the decision in the case of Atma Ram (Supra) by contending, Trial Court did not fix any occupation charges. On an appeal, Tribunal did so as the first Appellate Court. The Apex Court considered it reasonable and upheld so. In the case of State of Maharashtra (Supra)

the Trial Court did not fix any amount. Considering the location of the property the Apex Court directed deposit of a higher amount.

11. On the factual score, the learned Advocate General contended, the appellant did not possess the entire property. They were tenant in respect of a flat having 1500 square feet area. The building was in dilapidated condition as contended by Mr. Mitra. Such aspect should be considered in case the Court of Appeal would intend to increase the occupation charges.

12. We have considered the rival contentions. As observed herein before, in an appeal from decree at the first appellate stage the appellant was entitled to the order of admission of the appeal as a matter of course. The order of stay would however depend upon the discretion of the Court. Under Order 41 Rule 5 of the CPC the Appellate Court was entitled to impose condition while passing an order of stay. Such power of the Court of Appeal was recognized by the Apex Court in the case of Atma Ram Properties Private Limited (Supra). The learned Advocate General also did not dispute such proposition. Question would thus remain whether the Court of Appeal should in the present case impose further condition when the learned Single Judge already enhanced the amount of occupation charges and the appellant accepted the same and was regularly paying the same. In the case of Atma Ram (Supra) the original rent was Rs. 371.90. The first appellate Court while staying the decree of eviction imposed a condition upon the appellant tenant to deposit Rs. 15,000 per month. While doing so the Court considered, adjoining premises belonging to the same landlord fetched Rs. 3.5 lacs per month as rent in respect of a 2,000 square feet area. Paragraph 20 of this decision being relevant hearing is quoted below:-

In the case at hand, it has to be borne in mind that the tenant has been paying Rs. 371.90p. rent of the premises since 1944. The value of real estate and rent rates have skyrocketed since that day. The premises are situated in the prime commercial locality in the heart of Delhi, the capital city. It was pointed out to the High Court that adjoining premises belonging to the same landlord admeasuring 2000 square feet have been recently let out on rent at the rate of Rs. 3,50,000 per month. The Rent Control Tribunal was right in putting the tenant on term of payment of Rs. 15,000 per month as charges for use and occupation during the pendency of appeal. The Tribunal took extra care to see that the amount was retained in deposit with it until the appeal was decided so that the amount in deposit could be disbursed by the appellate court consistently with the opinion formed by it at the end of the appeal. No fault can be found with the approach adopted by the Tribunal. The High Court has interfered with the impugned order of the Tribunal on an erroneous assumption that any direction for payment by the tenant to the landlord of any amount at any rate above the contractual rate of rent could not have been made. We cannot countenance the view taken by the High Court. We may place on record that it has not been the case of the respondent tenant before us, nor was it in the

High Court, that the amount of Rs. 15,000 assessed by the Rent Control Tribunal was unreasonable or grossly on the higher side.

13. The Apex Court again in the case of State of Maharashtra (Supra) considered the value of the land from the Stamp Duty Ready Reckoned of the Government and imposed term by enhancing the amount of occupation charges. While doing so, the Apex Court relied on their earlier decision in case of Atma Ram Property (Supra). Paragraph 77 of this decision being relevant herein is quoted below:

In the light of the discussions made above we hold that in an appeal or revision preferred by a tenant against an order or decree of an eviction passed under the Rent Act it is open to the appellate or the Revisional Court to stay the execution of the order or the decree on terms, including a direction to pay monthly rent at a rate higher than the contractual rent. Needless to say that in fixing the amount subject to payment of which the execution of the order/decreed is stayed, the Court would exercise restraint and would not fix any excessive, fanciful or punitive amount.

14. Considering the Apex Court decisions we feel, the Court of appeal was entitled to impose terms upon the appellant to have the decree of eviction stayed.

15. Question would still be germane as to whether we should exercise our discretion to order an unconditional stay or to retain the condition imposed by the learned Single Judge or to put stricter condition. To use discretion Court always exercises it judiciously. The Court considers the balance of convenience. The Court also considers the chance of success of the appellant in the appeal. The Court further considers prejudice that the decree holder might suffer due to the delayed execution of the decree they successfully obtained from the original Court. In the instant case the appellant contended, that they were tenants under the respondent independent of the development agreement. Clause - XII(a) being relevant herein is quoted below :-

It has been agreed by and between the parties hereto that the owner will deliver the entire ground floor less one room and bathroom of the said property to the Developer in part performance of the obligations with effect from 15th September, 1987 and till demand and the Developer will compensate the owner Rs. 1500/- as rent and Rs. 3500/- as maintenance charges.

16. The appellant contended, they were put in possession in September 1987. Our attention was not drawn to any evidence to the said effect. Even if it was true that could not be said to be an independent act of the parties if we go through the development agreement as a whole and particularly Clause XII(a) quoted (Supra). Clause XII(a) would inter-Alia provide, owner would deliver entire ground floor burring a small area to the developer in part performance of the obligation with effect from September 15, 1987 upon payment of occupation charges. The agreement was ultimately entered into on December 23, 1987. The appellant also contended, they were put in possession in September 1987. Hence such possession,

as it appears prima-facie to us, was in terms of Clause-XII(a) where tenancy was never created. Learned Judge held so. Hence the chance of success of the appeal as we prima-facie find, was not such that the appellant would deserve an unconditional stay. Their own letter dated July 13, 1998 in reply to the notice of termination did not assert they were put to possession as a tenant. By the letter dated July 6, 1998 appearing at page 90-91 the respondent inter-Alia demanded as follows :-

I, therefore treat the Agreement dated 23rd December, 1987 as terminated and call upon you to vacate forthwith the portion of the ground floor of No. 8, Short Street occupied by you. This is without prejudice to my rights to claim against you for any other breaches of the said agreement.

17. In reply, the appellant by their letter dated July 31, 1998 denied to have breached the condition of the agreement. They contended, they were willing to perform the agreement which could not be done in absence of the owner not being able to hand over vacant possession. Nowhere in the letter they asserted the tenancy or denied the right of the owner to get back possession.

18. These are our prima-facie view considered only for the purpose to find out the chance of success of the appellant in the appeal that we find bleak. We abundantly say, our view is absolutely prima-facie.

19. We thus unhesitatingly say, the appellant must be put to stricter term in obtaining an order of stay of the decree as it would amount to delayed execution of the decree of recovery possession that the respondent got after 13 years of filing of the suit.

20. We now come to the last question as to what would be the reasonable amount of occupation charges, which we would be asking the appellant to pay. The learned Judge already directed payment of Rs. 30,000 per month. The appellant accepted the same and is regularly paying the same to the landlord as informed to us by the party. Let them do so till the disposal of the appeal.

21. We further ask the appellant to deposit an additional sum of Rs. 50,000 per month with the Registrar, High Court, Original Side, as an additional amount of occupation charges until the appeal is disposed of. The Registrar, Original Side, would keep it in a recurring fixed deposit month by month in any nationalized Bank of his choice to be kept renewed till the disposal of the appeal.

22. The department is directed to draw up the decree with utmost expedition. The appellant is directed to file informal paper book incorporating all papers including the deposition and the judgment and decree impugned within four weeks after the Christmas Vacation. As and when paper book is filed place the appeal for appearing, in default place it for final order.

23. There would be unconditional stay of operation of the decree till December 31, 2012 and would continue until any default is committed by the appellant in paying

the occupation charges to the respondent as directed by the learned Single Judge and depositing the additional amount of occupation charges with the Registrar as directed by the foregoing order.

24. The first of such additional amount must be deposited by December 31, 2012 and thereafter on the last day of each succeeding month.

25. We abundantly make it clear, our observations in the foregoing judgment and decree must not influence the final hearing of the appeal.

26. G.A. No. 2733 of 2012 disposed of without any order as to costs. Urgent certified copy of this judgment, if applied for, be given to the parties on their usual undertaking.

Shukla Kabir (Sinha), J.

I agree.