

**(2005) 09 CAL CK 0053**

**Calcutta High Court**

**Case No:** F.A. No. 247 of 2004

Bhartia Electric Steel Co. Ltd.

APPELLANT

Vs

Buddha Dev Bose

RESPONDENT

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**Date of Decision:** Sept. 13, 2005

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2, Order 21 Rule 97, Order 9 Rule 13
- Limitation Act, 1963 - Section 5
- West Bengal Premises Tenancy Act, 1956 - Section 13(1), 13(6)

**Citation:** (2006) 2 CHN 1

**Hon'ble Judges:** Sadhan Kumar Gupta, J; Bhaskar Bhattacharya, J

**Bench:** Division Bench

**Advocate:** Ashok Banerjee, Paratik Prakash Banerjee, Subhankar Nag, Debamitra Adhikari, Siddique Parveen and Richard Mistry, for the Appellant; Saktinath Mukherjee and Saptangshu Basu, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Bhaskar Bhattacharya, J.

This first appeal is at the instance of a defendant in a suit for recovery of arrears of mesne profit and damages and is directed against an ex parte decree dated November 22, 2000 passed by the learned Judge, 10th Bench, City Civil Court at Calcutta in Money Suit No. 63 of 1997.

2. The respondent herein filed the aforesaid suit for recovery of arrears of mesne profit and damages as well as interest on the following allegations:

(a) The respondent is the owner of a flat being Flat No. 14C, situated on the fourteenth floor of a multi-storied building at premises No. 10, Lord Sinha Road where the appellant was inducted as a tenant in respect of the said flat along with one covered parking space in the ground floor.

(b) The respondent filed a suit for recovery of possession of the said flat as well as parking space being Ejectment Suit No. 348 of 1991 on the grounds, inter alia, that the appellant has made default in payment of rent from June, 1986 onwards at the rate of Rs. 3,000/- a month. Ultimately, the appellant did not contest the suit and the learned Judge decreed the suit ex parte.

(c) The appellant did not, however, deliver vacant possession of the property pursuant to the said decree and consequently, the respondent filed the suit for mesne profit at the rate of Rs. 20,000/- a month from the month of January, 1994 to January, 1997 as detailed in the plaint. The respondent also claimed interest at the rate of 12 per cent per annum.

3. In spite of service, none appeared on behalf of the appellant and the learned Trial Judge on the basis of ex parte evidence adduced by the respondent decreed the suit in full.

4. Being dissatisfied, the appellant has come up with the present appeal.

5. It may not be out of place to mention here that the present appellant did not file any application under Order 9 Rule 13 of the CPC alleging non-service of summons but straightaway preferred the present appeal along with an application u/s 5 of the Limitation Act and such application for condonation of delay was allowed.

6. Mr. Banerjee, the learned senior advocate appearing on behalf of the appellant, at the first instance, took a pure question of law in support of this appeal. According to Mr. Banerjee, in the prior suit for ejectment being Ejectment Suit No. 348 of 1991, the plaintiff-respondent not having made any prayer for recovery of mesne profit and at the same time, not having taken any leave under Order 2 Rule 2 of the CPC to sue separately for the same, the subsequent suit for mesne profit was not maintainable. Mr. Banerjee points out that in the suit for ejectment earlier filed, the respondent not only claimed eviction on the ground of default in payment of rent but also on the ground that the appellant gave notice in terms of Section 13(1)(j) and 13(1)(k) of the West Bengal Premises Tenancy Act. According to Mr. Banerjee, once such allegation is made, the respondent had a right to claim mesne profit from the date of termination of relationship of landlord and tenant between the parties as mentioned in the notice alleged to have been given by the tenant. Mr. Banerjee, therefore, contends that in the earlier suit for eviction it was the duty of the respondent to claim mesne profit as the cause of action for filing a suit for mesne profit accrued, the moment the tenant refused to vacate in terms of his notice to surrender tenancy.

7. The aforesaid contention is seriously disputed by Mr. Saktinath Mukherjee, the learned senior advocate for the respondent. Mr. Mukherjee submits that although, the respondent made out a ground mentioned in Section 13(1)(j) and 13(1)(k) of the Act along with the ground of default in payment of rent, the suit was decreed only on the ground of default in payment of rent and such being the position, the

tenancy continued till the date of passing of decree and did not terminate earlier. Mr. Mukherjee contends that simply because the tenant gave a notice u/s 13(1)(j) or 13(1)(k) of the Act but did not surrender possession pursuant to such notice, such fact did not confer right upon his client to file a suit for mesne profit. However, in spite of giving such a notice, Mr. Mukherjee continues, if the tenant does not quit, the landlord is required to file a suit for eviction in terms of Section 13 of the West Bengal Premises Tenancy Act and in such a case, so long decree is, not passed, the relationship of landlord and tenant continues, Mr. Mukherjee further points out that in this case, the Court has not passed the decree on any of the grounds mentioned in Sections 13(1)(j) or 13(1)(k) but the suit was decreed solely on the ground of default in payment of rent. Therefore, according to Mr. Mukherjee, the aforesaid contention of Mr. Banerjee is not tenable.

8. After hearing the learned Counsel for the parties and after going through the aforesaid material on record, we find substance in the contentions of Mr. Mukherjee that the suit having been decreed only on the ground of default in payment of rent, the appellant continued to be a tenant till the passing of the decree and as such, the cause of action for claiming mesne profit did not accrue when suit was filed for eviction by giving a notice u/s 13(6) of the West Bengal Premises Tenancy Act also on the ground of default in payment of rent. Therefore, no question of taking leave under Order 2 Rule 2 of the Code arose at the time of filing of the previous suit. We, therefore, find no substance in the first contention of Mr. Banerjee.

9. Mr. Banerjee next contends that fixing of mesne profit at the rate of Rs. 20,000/- a month cannot be supported as the amount is an exorbitant one and such finding is based on no material and we should, therefore, set aside that decree. We have already pointed out that the suit has been decreed on the basis of ex parte evidence. There is no dispute that the suit property is a flat on fourteenth floor of a multi-storied building in a posh area of Kolkata, namely, Lord Sinha Road, along with parking space and therefore, the assessment of mesne profit at the rate of Rs. 20,000/- a month cannot be said to be excessive. In spite of specific assertion made in the plaint claiming mesne profit at that rate, the appellant decided not to answer and even did not contest at the time of hearing notwithstanding service of summons. The fixation of mesne profit at the rate just slight above Re. 1/- per sq. ft. in that area cannot be said to be unreasonable so as to interfere in this first appeal.

10. Mr. Banerjee further contends that the respondent has recovered possession from a third party by initiating proceedings under Order 21 Rule 97 of the CPC and in that proceedings got certain amount of money from the third party and as such, the Court ought to have deducted that amount while passing the decree.

11. In this case, after suffering a decree for eviction, it was the duty of the appellant to hand over possession. The appellant did not give up such possession and as a reason thereof the respondent had initiated proceedings for police help for recovery of the possession not only from the appellant but also from a third party. Therefore,

the tenant cannot escape his liability of making payment of mesne profit for his illegal occupation so long the possession was not recovered by the landlord.

12. The plea now advanced before us that the respondent received money from the third party was never taken before the learned Trial Judge. Moreover, it appears from record that possession was recovered in the year 2000 but in this suit the decree for mesne profit has been passed for the period from January, 1994 to January, 1997. The appellant being the sole judgment-debtor against whom the decree for possession having been passed and not having raised any plea of appointment of mesne profit in the Trial Court, such defence is not available to the appellant in this appeal on the basis of materials on record.

13. All the points taken by the appellant having failed, we find no merit in this appeal and the same is accordingly dismissed. In the facts and circumstances, there will be, however, no order as to costs.

Sadhan Kumar Gupta, J.

14. I agree.