

**HIGH COURT AT CALCUTTA**

***CIVIL APPELLATE JURISDICTION***

**C.O. 1627 of 2015**

**Gautam Dey**

**-Vs-**

**Pareshnath Kar & Ors.**

**Present: Hon'ble Justice Harish Tandon**

For the Petitioner : Mr. Shyama Prasad Roy Chowdhury, Sr. Advocate,  
Mr. Debasish Roy, Advocate,  
Mr. Sourav Sen, Advocate,  
Mrs. Sumitra Das, Advocate  
Ms. Kasturi Tarafdar, Advocate

For the Opposite Party : Mr. Suchit Kr. Banerjee, Advocate,  
Mr. Indranil Banerjee, Advocate.

Judgment on : 30/11/2015

**Harish Tandon, J.:**

After having suffered an eviction decree from the Court of first instance the tenant carried the same to the Appellate Court exercising statutory right of appeal. In the said appeal, an application for stay of the execution proceeding was taken out which is disposed of by the impugned order. The Appellate Court frowned upon the conditions for disposal of an application for stay directing the Appellant / Petitioner to pay the occupational charges of Rs. 8,40,000/- per month from the month of April, 2015 till the disposal of appeal.

2. The challenge of the impugned order is based upon the reasonability of the quantum of occupational charges determined by the Appellate Court as the same is excessive, harassive, punitive and operates *in terrorem*. An argument is advanced on fixation of quantum of occupational charges as condition precedent for securing an order of stay of the execution proceeding to be unreasonable and beyond the conceivable limit.

3. This Court feels necessary to adumbrate the salient features of facts involved in instant Revisional Application before proceeding to decide the points urged before it. The Plaintiff / Opposite Party being trustees and sebatas of several deities who owned the impugned property demised unto and in favour of the predecessor-in-interest of the present appellant by two registered indenture of lease dated April 30<sup>th</sup>, 1945 and December 17<sup>th</sup>, 1945 respectively. By virtue of the first lease dated April 30, 1945 the predecessor-in-interest of the Petitioner was put in possession in respect of a demarcated Eastern portion of Premises No. 20, Deshpran Sasmal Road, Tollygunj, Kolkata for a period of 45 years commencing from the month of May, 1945. The subsequent lease dated December 17<sup>th</sup>, 1945 was executed in respect of a demarcated Western portion of the said premises for a period of 44 years and 5 months. The intention of the parties which could be gathered from the aforesaid documents that both the leases were to expire on the same date so that the possession could be recovered in respect of the entire premises. Admittedly, the Petitioner had constructed a cinema hall on the said premises and is running the same. A plea was taken that the Petitioner being a monthly tenant his tenancy is protected under the West Bengal Premises Tenancy Act, 1956. The Trial Court ultimately decreed the suit negating the contention of the Defendant that he is a monthly tenant.

4. Mr. Roy Chowdhury, the Senior Advocate for the Petitioner submits that the Appellate Court should not put an unreasonable terms for granting an order of stay pending the first appeal. He, further, submits that the contractual rent under the aforesaid indentures of lease cannot be astronomically increased by the Court as condition for passing an order of stay of the execution proceeding. According to Mr. Roy Chowdhury, if the conditions for payment of occupational charges pending the appeal is put in such term which virtually makes it impossible to comply is in other way round shall oust the Appellant before the appeal is finally decided by the Appellate Court. In other words, it is submitted that the conditions should not be too excessive or punitive or *in terrorem* which is impossible even after exhausting the statutory right of an appeal. To this Mr. Roy Chowdhury

further submits that the Appellate Court should also look into the other attending facts and circumstances more particularly the claim of mesne profit made in the plaint and should not embark to fix the quantum of occupational charges much higher than that. While admitting that the Appellate Court can put the Appellant on terms before granting the order of stay of execution, it is submitted that the occupational charges should not be fixed to astronomical figure more particularly on the basis of the report of the valuer. To buttress the aforesaid argument Mr. Roy Chowdhury relies upon the judgment of the Supreme Court rendered in the case of **Atma Ram Properties (P) Ltd. -Vs- Federal Motors (P) Ltd.** reported in **2005(1)SCC 705**. Mr. Roy Chowdhury would contend that the Supreme Court in the said report though laid down that the Appellate Court should put the Appellant on terms in an application for stay of the execution proceeding but such terms should be rational and not oppressive. He, thus, submits that the said judgment was considered in a subsequent decisions rendered by the Supreme Court wherein it is held that reasonability, rationality and striking off balance between the parties are the important factors. To support the aforesaid contention he relies upon the following judgments:-

- i) **Atma Ram Properties (P) Ltd. -Vs- Federal Motors (P) Ltd.** reported in **2005(1) SCC 705**,
- ii) **Anderson Wright & Co. -Vs- Amarnath Roy & Ors.** reported in **2005(6) SCC 489**,
- iii) **Niyas Ahmed Khan -Vs- Mahmood Rahmat Ullah Khan & Anr.** reported in **2008(7) SCC 539**,
- iv) **State of Maharashtra & Anr. -Vs- Supermax International Private Ltd.** reported in **2009(9) SCC 772**,
- v) **Mohammad Ahmad & Anr. -Vs- Atma Ram Chauhan & Ors.** reported in **2011(7) SCC 755**.

He concludes by saying that the quantum of occupational charges fixed by the Appellate Court in the impugned order is unimaginable and cannot be a present market rent if let out today by the Opposite Party.

5. Mr. Suchit Kumar Banerjee, the learned Advocate representing the Opposite Parties countered the submission of Mr. Roy Chowdhury that the Appellate Side have considered the location, advantages, reasonable price and the rent prevalent at the locality which cannot be said to be unreasonable, irrational and excessive. He fervently submits that the property which was leased out in the year 1945 ended in the year 1990 and therefore, the rent fixed way back in the year 1945 cannot remain the same because of the various factors indicated in the report submitted by the approved valuer. He strongly submits that apart from strong denial the Petitioner could not produce us a piece of evidence before the Appellate Court to disprove the prevalent market rent assessed by the said valuer and therefore the order of the Appellate Court cannot be impugned merely on the basis of the statement at the bar. He also relies upon a judgment rendered in case of **Atma Ram Properties (P) Ltd (supra)** and submitted that the ratio laid down therein is aptly clear that the Court should balance the right of the parties while putting the terms for granting the stay of the execution proceeding. According to him, the property is situated in a prime location of Kolkata and it is improbable that the lessee who suffered a decree should be allowed to enjoy the property at a contractual rent fixed in the year 1945. He, thus, supports the quantum of occupational charges fixed by the Appellate Court as condition precedent for stay of the execution proceeding.

6. At the threshold, this Court must record the parties are *ad idem* to the proposition of law that the Appellate Court is not denuded of power to put the Appellant on terms while passing an order of stay of the execution proceeding. Both the parties are at variance on the quantum of occupational charges and the manner in which such quantum is required to be determined.

7. In case of **Atma Ram Properties (P) Ltd (supra)** the premises in question was a non-residential and commercial premises situated in Cannaught Circus, New Delhi admeasuring 1000 Square Feet (Apprx.) and governed by the Delhi Rent Control Act, 1958. An eviction proceeding was initiated which culminated into a decree. The Appellate Forum directed the

tenant therein to deposit a sum of Rs. 15,000/- per month in addition to the contractual rent. The said order was challenged before the High Court and was thus, reversed; as a consequence where-of, the execution proceeding was directed to remain stayed till the disposal of appeal upon payment of the contractual rent. Before the Supreme Court, it was urged that the High Court cannot allow the tenant who suffered a decree to enjoy the decretal premises upon payment of the contractual rent. The Apex Court held that the language of Order 41 Rule 5 of the Code is very clear in the sense that mere filing an appeal shall not operate as a stay of the execution proceeding. The Apex Court in unequivocal terms held that though the dispossession during the pendency of an appeal is normally considered to be a substantial loss to the party but it should also bear in mind that a successful litigant is restrained to get the possession and deprived of to enjoy the benefit therefrom. It is unequivocally held that the Appellate Court while exercising jurisdiction under Order 41 Rule 5 of the Code can put the Appellant on terms in order to strike a balance between the rights of the parties. It would be profitable to quote Paragraph 19 of the said judgment where the Supreme Court summarised the proposition of law on the above subject, which reads thus:--

*“19. To sum up, our conclusions are:*

*(1) While passing an order of stay under Rule 5 of Order 41 of the Code of Civil Procedure, 1908, the appellate court does have jurisdiction to put the applicant on such reasonable terms as would in its opinion reasonably compensate the decree-holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed and insofar as those proceedings are concerned. Such terms, needless to say, shall be reasonable.*

*(2) In case of premises governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant contained in clause (l) of Section 2 of the Act, the tenancy does not stand terminated merely by its termination under the general law; it terminates with the passing of the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree.*

*(3) The doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter date.”*

8. The ratio laid down in case of **Atma Ram Properties (P) Ltd (supra)** is applied and approved in a subsequent decision delivered in case of

**Anderson Wright & Co. -Vs- Amarnath Roy & Ors.** Reported in **2005(6) SCC 489** with categorical exposition of law that while determining the quantum of amount so received by the landlord, the landlord is not bound by the contractual rent, which was prevalent prior to the date of the decree. It was ultimately held that the rate of rent prevalent in the locality should be directed to be paid as condition for grant of stay of the execution proceeding without being swayed by the fact that the contractual rent is too meagre.

9. It is, thus, settled that the Appellate Court shall not be guided by the factors that the parties at one point of time while creating the tenancy have agreed at the meagre amount of rent, at the time of putting the condition for passing the order of stay. It is dependent upon the various factors and the materials produced before the Appellate Court on the prevalent market rent in a nearby premises.

10. Mr. Roy Chowdhury heavily relies upon the judgment of the Supreme Court in case of **Niyas Ahmed Khan -Vs- Mahmood Rahmat Ullah Khan & Anr.** to support his argument that the fixation of occupational charges at present market rent in the locality should not be such which is unreasonable, oppressive or *in terrorem*. The reliance is heavily placed on the observation of the Supreme Court in Paragraph 9 of the said report which this Court feels to reproduce as under:--

*“9. We should however note the distinction between cases where a writ petition is filed by the tenant challenging the order of eviction and seeking stay of execution thereof, and cases where a writ petition is filed by the landlord challenging the rejection of a petition for eviction. What we have stated above is with reference to writ petitions filed by landlords. In writ petitions filed by tenants, while granting stay of execution of the order of eviction pending disposal of writ petition, the High Court has the discretion to impose reasonable conditions to safeguard the interests of the landlord. But even in such cases the High Court cannot obviously impose conditions which are ex facie arbitrary and oppressive thereby making the order of stay illusory. When a tenant files a writ petition challenging the order of eviction, the High Court may reject the writ petition if it finds no merit in the case of the tenant; or in some cases, the High Court may admit the writ petition but refuse to grant stay of execution, in which event, the tenant may be evicted, but can claim restoration of possession if he ultimately succeeds in the writ petition; or in some cases, the High Court finding the case fit for admission, may grant stay of eviction, with or without conditions, so that status quo is maintained till the matter is decided. Where the High Court chooses to impose any conditions in regard to stay, such conditions should not be unreasonable or oppressive or in terrorem. Adopting some arbitrary figure as prevailing market rent without any basis and directing the tenant to pay absurdly high rent would*

*be considered oppressive and unreasonable even when such direction is issued as a condition for stay of eviction. The High Court should desist from doing so.”*

11. In case of **State of Maharashtra & Anr. -Vs- Supermax International Private Ltd.** Reported in **2009(9) SCC 772** the Three Judges' Bench of the after noticing the ratio laid down in **Atma Ram Properties (P) Ltd (supra) & Niyas Ahmed Khan (supra)** have reiterated the principles laid down therein to the effect that the Court should grant the stay of the execution proceeding by putting condition of deposit of the contractual rent but the quantum of occupational charges should not be excessive, fanciful and punitive. In the said decision the Appellate Court determined the quantum of occupational charges as prevalent market rent on the basis of the amount fixed with reference to a stamp duty ready reckoner and held the same to be reasonable. It would be profitable to quote the relevant portions which are thus:--

*“74. In Atma Ram Properties the Court viewed the issue exactly in the same way (see paras 6, 8 and 9 of the decision). Further, the decision also answers Mr Lalit's submission that the tenancy did not come to end on the passing of the decree but would continue until the tenant was actually physically evicted from the premises in execution of the decree.*

*75. In Atma Ram Properties the Court framed two issues arising for consideration as follows:*

*“10. ... This submission raises the following two issues: (i) in respect of premises enjoying the protection of rent control legislation, when does the tenancy terminate; and (ii) up to what point of time is the tenant liable to pay rent at the contractual rate and when does he become liable to pay compensation for use and occupation of the tenancy premises unbound by the contractual rate of rent to the landlord?”*

*76. The Court answered the first issue as follows:*

*“16. We are, therefore, of the opinion that the tenant having suffered a decree or order for eviction may continue his fight before the superior forum but, on the termination of the proceedings and the decree or order of eviction first passed having been maintained, the tenancy would stand terminated with effect from the date of the decree passed by the lower forum. In the case of premises governed by rent control legislation, the decree of eviction on being affirmed, would be determinative of the date of termination of tenancy and the decree of affirmation passed by the superior forum at any subsequent stage or date, would not, by reference to the doctrine of merger have the effect of postponing the date of termination of tenancy.”*

*The second issue was answered as follows:*

“(2) ... With effect from that date (the passing of the decree of eviction), the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree.” (words in parenthesis added) (emphasis supplied)

We are in respectful agreement with the decision of the Court in *Atma Ram Properties*.

**77.** 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/decree is stayed, the Court would exercise restraint and would not fix any excessive, fanciful or punitive amount.

**78.** In the case in hand, the High Court has fixed the amount of Rs. 5,40,000 per month with reference to Stamp Duty Ready Reckoner and hence, its reasonableness cannot be doubted. In fairness to Mr Lalit he did not challenge the fixation of the amount on that ground.” (emphasis supplied)

12. In subsequent decision delivered in case of **Mohammad Ahmad & Anr. -Vs- Atma Ram Chauhan & Ors.** reported in **2011(7) SCC 755** the identical point came up for consideration, the bench while approving and reinstating the principles of law laid down in **Atma Ram Properties (P) Ltd (supra)** held ---

**“21.** According to our considered view majority of these cases are filed because the landlords do not get reasonable rent akin to market rent, then on one ground or the other litigation is initiated. So before saying omega, we deem it our duty and obligation to fix some guideline and norms for such type of litigation, so as to minimise landlord-tenant litigation at all levels. These are as follows:

- (i) The tenant must enhance the rent according to the terms of the agreement or at least by ten per cent, after every three years and enhanced rent should then be made payable to the landlord. If the rent is too low (in comparison to market rent), having been fixed almost 20 to 25 years back then the present market rate should be worked out either on the basis of valuation report or reliable estimates of building rentals in the surrounding areas, let out on rent recently.
- (ii) Apart from the rental, property tax, water tax, maintenance charges, electricity charges for the actual consumption of the tenanted premises and for common area shall be payable by the tenant only so that the landlord gets the actual

*rent out of which nothing would be deductible. In case there is enhancement in property tax, water tax or maintenance charges, electricity charges then the same shall also be borne by the tenant only.*

- (iii) The usual maintenance of the premises, except major repairs would be carried out by the tenant only and the same would not be reimbursable by the landlord.*
- (iv) But if any major repairs are required to be carried out then in that case only after obtaining permission from the landlord in writing, the same shall be carried out and modalities with regard to adjustment of the amount spent thereon, would have to be worked out between the parties.*
- (v) If the present and prevalent market rent assessed and fixed between the parties is paid by the tenant then the landlord shall not be entitled to bring any action for his eviction against such a tenant at least for a period of 5 years. thus for a period of 5 years the tenant shall enjoy immunity from being evicted from the premises.*
- (vi) The parties shall be at liberty to get the rental fixed by the official valuer or by any other agency, having expertise in the matter.*
- (vii) The rent so fixed should be just, proper and adequate, keeping in mind the location, type of construction, accessibility to the main road, parking space facilities available therein, etc. Care ought to be taken that it does not end up being a bonanza for the landlord.”*

13. None of these judgments have laid down the contrary proposition so far as the power of the Appellate Court to direct the Appellant to pay the higher amount as occupational charges for enjoying an order of stay of the execution proceeding pending the appeal. The quantum of occupational charges is not static but depends upon the various factors which could be reasonably ascertained from the aforesaid decisions. Though, the Appellate Court is within its power and jurisdiction to direct the Appellant to pay the occupational charges at the prevalent market rent but at the same time the Court should not arbitrarily fix the quantum which in other way operate harshly upon the Appellant and the order appears to be punitive and *in terrorem*. In absence of any material before the Appellate Court on the prevalent market rent, the Appellate Court can apply robust common sense, the common knowledge of human affairs and events gained by the judicial experience and judicially noticeable facts. The tenant who suffered a decree for eviction is depriving the landlord to get the possession immediately on

passing the decree as the statutory right of an appeal is provided in law. A distinction is to be drawn between a right of an appeal and a right to get an order of stay of the execution proceeding pending such statutory appeal. The legislative intent can be gathered from the language of Order 41 Rule 5 of the Code which permits the Appellate Court to put the Appellant on terms. In **Supermax Internation Ltd. (supra)** the Court took a yardstick of the stamp duty ready reckoner to fix the quantum of prevalent market rent and accepted the same as reasonable.

14. In the instant case the report of the valuer would evince that the full rental value of the property was assessed not only on the basis of the location and its advantages, but also on the basis of the value of the property fixed by the Government for the purpose of the stamp duty. According to the approved valuer the current rental value of the property would not be less than Rs. 8,40,000/- per month for the property which has a market value of Rs. Twelve crores and above. In reply, there is not a single whisper on the said report but rest upon a plea that it requires determination under Order 20 Rule 12 of the Code. The assessment of the mesne profit under the aforesaid provision is distinct and it stands on its independent footing and cannot be infused with the power of the Appellate Court in putting the Appellant on terms under Order 41 Rule 5 of the Code. There is no material available on the record at least from the side of the Appellant / Petitioner that the market value assessed by the valuer is not based upon any materials.

15. This Court, therefore, does not find that the condition put by the Appellate Court in directing the Appellant to deposit the occupational charges @ Rs. 8,40,000/- per month as condition precedent for granting the stay is excessive and punitive.

16. The Revisional Application sans substance both on merit and on law and is, therefore, dismissed.

17. There shall be no order as to costs.

**(Harish Tandon, J.)**