

(2023) 10 SIK CK 0015

In the Sikkim High Court

Case No : Civil Revision Petition No. 05 Of 2023

Chairman, National Highways & Infrastructure Development Corporation Limited, Corporation Office, 3rd Floor, PTI Building, 4 Parliament Street, New Delhi-110001 & Ors **APPELLANT**

Vs

Government Of Sikkim, Through The Chief Secretary, Secretariat Building, Gangtok Sikkim, Pin code 737101 & Ors **RESPONDENT**

Date of Decision : 09-10-2023

Acts Referred:

Code Of Civil Procedure, 1908 — Section 151
Code Of Civil Procedure, 1908 — Order 39 Rule 1, Order 39 Rule 2, Order 41 Rule 1(3), Order 41 Rule 5, Order 41 Rule 5 (1), Order 41 Rule 5(3), Order 41 Rule 5(3)(c), Order 41 Rule 5(5)
Constitution Of India, 1950 — Article 226, 227

Citation : (2023) 10 SIK CK 0015

Hon'ble Judges : Bhaskar Raj Pradhan, J

Bench : Single Bench

Advocate : Sudipto Mazumdar, Gita Bista, Pratikcha Gurung, Shakil Raj Karki, Sujan Sunwar, B. Sharma, M.N. Dhungel, Sajal Sharma, Rachana Rai, Puja Kumari Singh, Roshni Chhetri, Chandra Boruah, Rajiv Boro

Final Decision : Disposed Of

Judgement

Bhaskar Raj Pradhan, J

1. The Order under challenge is dated 19.05.2023 passed by the learned Principal District Judge, Gangtok in Title Appeal No. 10 of 2022 disposing of two applications i.e. one under Order 39 Rule 1 and 2 read with section 151 of the Code of Civil Procedure, 1908 (CPC) filed by the Government of Sikkim and Forest and Environment Department i.e. respondent nos. 1 and 2 (defendant nos. 1 and 3 in Title Suit No. 02 of 2018 {the Title Suit}) and the other by Chairman, National Highway and Infrastructure Development Corporation Limited (NHIDCL) and Managing Director, NHIDCL i.e. revisionist nos. 1 and 2 (defendant nos. 8 and 9) both for stay of execution of judgment and decree dated

14.09.2020 passed in the Title Suit.

2. The impugned Order dated 19.05.2023 is assailed by the revisionists invoking Article 227 of the Constitution of India.

3. The Title Suit was filed by the respondent nos. 3 to 8 (the plaintiffs) claiming to be the owner of the suit land acquired in the year 1934. It was the respondent nos. 3 to 8's case that they had to shift from the suit land as the Rangpo River rose over portions thereof. According to them the suit land was however wrongly recorded in the name of "Sikkim Sarkar" as they learnt about it in the year 2014. It is the further case of the respondent nos. 3 to 8 that portions of their land were acquired by Ministry of Road Transport and Highways for construction of the overbridge. The respondent nos. 3 to 8 therefore, filed the suit for various reliefs including the relief of declaration of their right title and interest in the suit land, confirmation of possession, correction of record of rights and a declaration that they were entitled to the compensation assessed for portion of the suit land.

4. The Title Suit was decreed in favour of the respondent nos. 3 to 8. The learned Civil Judge passed a judgment dated 14.09.2020 in favour of the respondent nos. 3 to 8 deciding all the issues framed. Accordingly, the decree was drawn ordering that the respondent nos. 3 to 8 were entitled for the relief of rectifying the record of rights in their favour as also fair compensation from District Collector, respondent no.10 (defendant no.4) in lieu of portion of the land which has already been acquired by revisionist no.1. It was also ordered that the portion of land acquired by revisionist no.1 will not be disturbed owing to the compensation as entitled to the respondent nos. 3 to 8.

5. The respondent nos.1 and 2 preferred Title Appeal No. 10 of 2022 against the judgment and decree passed by the learned Civil Judge. They filed an application under Order 39 Rule 1 and 2 read with section 151 of the CPC praying for stay of the impugned judgment and decree dated 14.09.2020 passed by the learned Civil Judge. They also prayed for stay of further proceedings in Civil Execution Case No.01 of 2022 till the final disposal of Title Appeal No. 10 of 2022. The revisionists also filed an application for stay of execution of the decree.

6. The applications were disposed of by the impugned Order dated 19.05.2023. It was held that the provision of Order 39 Rule 1 and 2 of the CPC was wrongly invoked but the applications could be disposed under the provisions of Order 41 Rule 5 of the CPC. The learned Principal District Judge was of the view that if the execution proceeding is completed, the appeal would be rendered useless for the respondent nos. 1 and 2 who had preferred the Title Appeal as well as the respondent nos.12 and 13 (defendant nos.6 and 7) and the revisionists. It was also held that it would be proper to stay the execution of the proceedings pending before the learned Civil Judge, Rangpo in Civil Execution Case No. 01 of 2022. The learned District Judge directed that the respondent nos. 1, 2, 12 and 13 as well as the revisionists should deposit the amount of compensation payable to the respondent nos. 3 to 8 pending the hearing and disposal of the appeal. It

was further directed that the learned Civil Judge shall make the assessment of the compensation within a reasonable time and the operation of the execution case will remain stayed thereafter, until further orders of the learned Principal District Judge.

7. The revisionists aggrieved by the impugned Order dated 19.05.2023 passed by the learned Principal District Judge has filed the present petition under Article 226 of the Constitution of India.

8. Heard Mr. Sudipto Mazumdar, learned Senior Counsel for the revisionists. It was submitted that the respondent nos. 3 to 8 had filed a declaratory suit only and as such there was no quantification of the amount of compensation liable to be paid to the respondent nos. 3 to 8. The respondent nos. 3 to 8 had valued the suit at Rs.500/- for declaration and injunction and Rs.4500/- for the other reliefs and paid the court fees accordingly. Therefore, there was no need for the learned Principal District Judge to direct deposit of compensation in favour of the respondent nos. 3 to 8 in an application filed by the respondent nos. 1 and 2 (the appellants in Title Appeal No. 10 of 2022 before the learned Principal District Judge). It was further argued that in the circumstances even if the impugned judgement and decree passed by the learned Civil Judge were to be upheld by the learned Principal District Judge he could not have gone beyond the decree and quantified the compensation payable as no such issue was examined by the learned Civil Judge as the decree passed by the learned Civil Judge was only for rectification of the record of rights and declaration that the respondent nos. 3 to 8 were entitled to fair compensation. It was further submitted that the amount of compensation could be only calculated by the authorities under the National Highways Act, 1956 and the Executing Court could not go beyond the decree passed by the learned Civil Judge.

9. Mr. B. Sharma, learned Senior Counsel for the respondent nos. 3 to 8 submitted that as the decree had been passed in favour of the respondent nos. 3 to 8 they were entitled to be secured and therefore, the impugned order called for no interference by exercise of the power revision under Article 227 of the Constitution of India.

10. Mr. Chandra Boruah, learned Standing Counsel for respondent nos. 12 and 13 submitted that the direction in the impugned order to the extent that it holds that even the respondent nos. 12 and 13 shall deposit the compensation amount is illegal as the said respondents are not at all involved in the entire process.

11. Mr. Shakil Raj Karki, learned Assistant Government Advocate for the respondent nos. 1, 2 and 9 to 11 also supported the arguments made by the learned Senior Counsel for the revisionists

Considerations

12. Amongst the 13 prayers prayed for in the plaint prayer (j) relates to compensation and it seeks "a decree declaring the plaintiffs are entitled for

compensation assessed for the portion of the suit land.” There is no prayer for the consequential relief of the specified amount of compensation.

13. The learned Civil Judge did not frame a specific issue on whether the respondent nos. 3 to 8 were entitled for compensation or how much compensation where they entitled to. While deciding issue no.(5) as framed above the learned Civil Judge held that the respondent nos. 3 to 8 were entitled to the relief of rectifying the records of rights in their favour and as a consequence relief of fair compensation from respondent no.10 in lieu of the portion of land which has already been acquired by revisionist no.1 on the basis of record of 1950-52 and 1979-80.

14. The learned Civil Judge was also of the view that the portion of land acquired by revisionist no.1 should not be disturbed.

15. Evidently the respondent nos. 3 to 8 did not pray for any further relief of specific amount of compensation except the declaration that they were entitled to compensation; the learned Civil Judge did not frame any issue on compensation; the learned Civil Judge did not grant any specific amount of compensation in favour of the respondent nos. 3 to 8.

16. The learned Principal District Judge was of the view that it would be proper to stay the execution of the proceedings pending before the learned Civil Judge in Civil Execution Case No. 01 of 2022. To protect the interest of the respondent nos. 3 to 8, the learned Principal District Judge directed that the revisionists and respondent nos. 12 and 13 to deposit the amount of compensation which the respondent nos. 3 to 8 were entitled pending the hearing and disposal of the appeal. The learned Principal District Judge also directed that the learned Civil Judge shall make assessment of the compensation within a reasonable time and the operation of the execution case will remain stayed thereafter, until further orders of the Court.

17. The question which falls for determination is whether the learned Principal District Judge was correct in directing the learned Civil Judge to determine the amount of compensation payable and the revisionists to deposit the calculated amount of compensation as security pending consideration of the appeal preferred by the respondent nos. 1 and 2?

18. Order 41 Rule 5 of the CPC deals with the power of the Appellate Court to stay the execution of a decree for sufficient cause. Order 41 Rule 5 of the CPC reads as under:-

“5. Stay by Appellate Court.- (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

[Explanation-An order by the Appellate Court for the stay of execution of the

decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the court of first instance.]

(2) Stay by Court which passed the decree.-Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied-

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him."

19. It is thus clear that before the grant of stay the Court is required to be satisfied that substantial loss may result to the party applying for stay of the execution unless the order is made; that there is no unreasonable delay in preferring the application; and that security has been given by the applicant for the due performance of such decree pending the hearing of the application. Order 41 Rule 5 (1) of the CPC clearly mandates that an appeal shall not operate as a stay or proceeding under a decree or order appeal from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree. Thus the Appellate Court is bound to apply its judicial mind and grant stay of execution, if necessary, only if it finds that there is "sufficient cause" for ordering the stay.

20. It is thus imperative that the Court which considers the application for stay of the execution of a decree under the provisions of Order 41 Rule 5 of the CPC and grants stay must give reasons for its satisfaction on all the three counts as provided in Order 41 Rule 5 (3) of the CPC. A composite reading of Order 41 of the CPC makes it clear that there is a difference between the word "deposit" and the word "security" used therein. In an appeal against the decree for payment of money it is imperative that the appellant "deposit" the amount disputed. This would be clear from reading Order 41 Rule 1 (3) and Order 41 Rule 5(5) of the CPC. In other cases also it is the discretion of the court to grant stay of the execution or refuse to do so. However, in case the Court decides to grant stay of the execution, "security" to its satisfaction, which necessarily need not be cash or bank guarantee, may be sought for. (see *Bhimasha vs. Special Land Acquisition Officer & Anr.* (2008) 10 SCC 797).

21. The decree granted in favour of the respondent nos. 3 to 8 is for rectification of record of rights and a declaration that they are also entitled to fair compensation. It is quite clear that the record of rights was in the name of "Sikkim Sarkar" for a considerable time. The respondent nos. 3 to 8 have also sought for a declaration that they are entitled to get back possession from the revisionists and respondent nos. 1 and 2. Thus it is also clear that the respondent nos. 3 to 8 were also not in possession of the suit land. Dispossession during pendency of an appeal of a party in possession is generally considered to be "substantial loss" in terms of Order 41 Rule 5 (3) (c) of the CPC as held by the Supreme Court. The condition that may be imposed under Order 41 Rule 5 (3) (c) of the CPC is not the only condition which the Appellate Court can impose. The power to grant stay is discretionary and flows from the jurisdiction conferred on an Appellate Court which is equitable in nature. To secure an order of stay merely by preferring an appeal is not a statutory right conferred on the appellant. So also, an Appellate Court is not ordained to grant an order of stay merely because an appeal has been preferred and an application for order of stay has been made. Therefore, an applicant for order of stay must do equity for seeking equity. Depending on the facts and circumstances of a given case, an Appellate Court, while passing an order of stay, may put the parties on such terms the enforcement whereof would satisfy the demand for justice of the party found successful at the end of the appeal. Therefore, while passing an order of stay under Order 41 Rule 5 of the CPC, 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 occasion 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. (see *Atma Ram Properties (P) Ltd. vs. Federal Motors (P) Ltd.* (2005) 1 SCC 705).

22. In a case of this nature while the Title Appeal is pending it would be necessary to maintain status quo by directing stay of the execution. Insofar as rectification of records of rights is concerned stay of the execution has already been granted. The direction of the learned Principal District Judge however, for "deposit" of the amount of compensation pending disposal of the appeal appears to be beyond the decree. This Court is also of the view that the direction of the learned Principal District Judge directing the learned Civil Judge to make assessment of the compensation payable to the respondent nos. 3 to 8 also appears beyond the powers of the Executing Court.

23. In such view of the matter, this Court is of the considered view that during the pendency of Title Appeal No. 10 of 2022 before the learned Principal District Judge the Execution Case No. 01 of 2022 shall remain stayed as ordered. The impugned order to the extent that it directs the learned Civil Judge to compute the compensation payable and the revisionists to deposit the amount calculated is set aside. The learned Principal District Judge is free to seek any other "security" to its satisfaction during the pendency of the title appeal keeping in

mind the nature of the relief prayed for by the respondent nos. 3 to 8 and granted by the learned Civil Judge. Needless to say the parameters of Order 41 of the CPC is a vital consideration. The learned Principal District Judge shall decide the Title Appeal No. 10 of 2022 expeditiously.

24. The impugned Order dated 19.05.2023 is modified to the above extent and Civil Revision Petition No. 5 of 2023 is disposed of accordingly.

25. In the facts and circumstances, the costs shall be borne by the respective parties. Pending interim application is also disposed of accordingly.

26. The observations made by this Court on facts is for the sole purpose of deciding the lis in the present revision petition and the learned Principal District Judge is not bound by any such observations while deciding the appeal.