

(2013) 09 CAL CK 0056
In the Calcutta High Court
Case No : C.O. 4056 of 2010

Miss. Neerja Lal and Another		APPELLANT
	Vs	
Shrimati Phyllis Ann Vellis and Another		RESPONDENT

Date of Decision : 25-09-2013

Acts Referred:

Citation : (2014) 2 CHN 420

Hon'ble Judges : Tarun Kumar Gupta, J

Bench : Single Bench

Advocate : Rabindra Nath Mahata and Ms. Jayeeta Chakraborty, for the Appellant; Saptangshu Basu and Mr. Jayanta Das, for the Respondent

Final Decision : Disposed Off

Judgement

Tarun Kumar Gupta, J.—This is an application under Article 227 of the Constitution of India challenging the Judgment and Order dated 30th August, 2010 passed by the learned Additional District Judge, Special Court at Midnapore, District-Midnapore (West) in Misc. Appeal No. 90 of 2009 reversing the Order No. 249 dated 30th July, 2009 passed by the learned Civil Judge (Junior Division), Second Court at Midnapore, District-Midnapore (West) in Judicial Misc. Case No. 45 of 2007. The background history of the case is that the petitioners being landlords obtained a decree of eviction against the opposite parties-tenants long back and filed an execution case being Execution Case No. 6 of 1992. Thereafter, opposite parties-tenants filed one Judicial Misc. Case after another all of which were dismissed for default. The opposite parties judgment debtors ultimately filed one Judicial Misc. Case being No. 57 of 2003 alleging the decree to be fraudulent, without jurisdiction etc. which was dismissed for default on 3rd December, 2005. The opposite parties judgment debtors filed Judicial Misc. Case No. 41 of 2005 under Order 9 Rule 9 of the CPC for restoration of said Judicial Misc. No. 57 of 2003 after setting aside the order of dismissal for default dated 3rd December, 2005. Said Judicial Misc. Case No. 41 of 2005 was fixed for hearing on 4th April, 2007 and the next date was fixed on 11th May, 2007. It

was again dismissed for default and thereafter the opposite parties judgment debtors filed another case being Judicial Misc. Case No. 45 of 2007 for restoration of Judicial Misc. Case No. 41 of 2005 after setting aside the order of dismissal for default dated 11th May, 2007. It was alleged that the petitioners of said Judicial Misc. Case were out of station in connection with their medical treatment and that law clerk of their lawyer also failed to take note on 4th April, 2007 or on any subsequent date the next date of said Judicial Misc. Case No. 41 of 2005, resulting its dismissal for default on 11th May, 2007. Accordingly, they prayed for restoration of said Judicial Misc. Case No. 41 of 2005. Learned executing Court dismissed said Judicial Misc. Case No. 45 of 2007 by Order No. 249 dated 30th July, 2009, mainly considering the past conduct of the petitioners of said Judicial Misc. Case. Said petitioners (opposite parties of this case) filed one appeal being Misc. Appeal No. 90 of 2009 in the appeal Court against said order of dismissal of their Judicial Misc. Case No. 45 of 2007. After contested hearing learned appeal Court allowed said Misc. Appeal No. 90 of 2009 by the order impugned.

2. Learned advocate, Mr. Rabindra Nath Mahata appearing for the petitioner decree holders submits that the present opposite party judgment debtors filed one Misc. Case after another viz. Judicial Misc. Case No. 17 of 1995, Judicial Misc. Case No. 10 of 1996, Judicial Misc. Case No. 11 of 1996, Judicial Misc. Case No. 57 of 2003 and lastly Judicial Misc. Case No. 41 of 2005 to stall execution of a hard-fought decree through Execution Case No. 6 of 1992. He submits that learned executing Court has rightly after taking note of the previous conduct of the present opposite parties judgment debtors and also the materials produced during hearing of said Judicial Misc. Case No. 45 of 2007, rejected the same. In this connection he refers an unreported decision of this Court passed on 30th July, 2003 in connection with C.O. 992 of 2004 (Tapan Kumar Gangopadhyay Vs. Premdhar Upadhyay and Anr.). In said case the Hon'ble Single Bench of this Court confirmed the order of dismissal of a Misc. Case under Order 9 rule 9 of the CPC praying for restoration of one title suit dismissed for default.

3. Learned senior advocate, Mr. Saptangshu Basu appearing for the opposite parties judgment debtors submits that the learned executing Court was carried away by the facts of dismissal of earlier Judicial Misc. Cases filed by the present opposite party judgment debtors and failed to consider the grounds as made out in the application of the Judicial Misc. Case No. 45 of 2007 in its proper perspective. According to Mr. Basu, at the time of hearing of an application for restoration of a case on setting aside the order of dismissal for default, the Court is required to consider the grounds made in the application and come to the conclusion as to whether those are acceptable or not. At the time of hearing of said Misc. Case praying for restoration of a case dismissed for default, the Court should not look into the past conduct of the petitioner of said Misc. Case. He submits that it was evident from the evidence on record that as the law clerk of the learned advocate of the present opposite party judgment debtors missed to note the next date of hearing of Judicial Misc. Case No. 45 of 2007, no step could

be taken by the learned advocate of the opposite parties judgment debtors resulting dismissal of the same for default on 11th May, 2007. According to him, learned appellate Court took note of said evidence on record and considering other circumstances of the case came to a right conclusion that the petitioners were prevented from sufficient cause in taking steps on the date of dismissal of the Misc. Case and that the Judicial Misc. Case No. 41 of 2005 was liable to be restored after setting aside the order of dismissal for default dated 11th May, 2007. In this connection he has referred case laws reported in 2008 (1) CLJ (Cal) 308 (Aloke Kumar Dey Vs. Ashoke Kumar Dey) and Sujit Paul Vs. Mousomi Paul (Poddar) to impress upon this Court that failure on the part of the learned advocate or his clerk to note the next date of the case resulting dismissal of the same for default, is a good ground for restoring the case dismissed for default as no one should be punished for laches on the part of his lawyer and/or lawyer's clerk.

4. I have considered the submissions made by the learned advocates of the parties. I have perused the order impugned, other materials on record and the referred case laws. There is no denial that at the time of hearing of an application for restoration of a case after setting aside the order of dismissal for default, the Court is required to examine the explanation given in the application for restoration and if said explanation is found to be plausible and acceptable then the Court should restore the case even if the petitioner was guilty of laches on earlier occasions. However, if the petitioner is guilty of laches on earlier occasions resulting prolonging of an execution case then the Court has the ample power to saddle the petitioner with sufficient cost by way of compensation to the affected party.

5. In the case in hand, the concerned lawyer's clerk was examined as a witness to exhibit relevant page of his diary. Said exhibit showed that he missed to note the next date of Judicial Misc. Case No. 41 of 2005, resulting his failure to communicate the next date to the opposite parties judgment debtors as well as to take steps on the next date. As a result the Misc. Case was dismissed for default. As the learned appellate Court meticulously examined the evidence on record and came to a finding of fact that the opposite party judgment debtors were prevented from sufficient cause in appearing in the Court on the date of dismissal for default, I find no cogent ground to interfere with said finding of fact. However, it is strange to find that though on account of laches on the part of agent of the judgment debtors there will be delay in disposal of the Judicial Misc. Case No. 41 of 2005 and there were several instances when Judicial Misc. Cases filed by this judgment debtors were dismissed for default on earlier occasions, the learned appellate Court did not award any cost, not to speak of sufficient cost, as condition of allowing said Misc. Appeal by way of restoration of Judicial Misc. Case No. 41 of 2005.

6. In view of the overall conduct of the judgment debtors, I am of the opinion that the impugned order of the learned lower appellate Court passed in

connection with Misc. Appeal No. 90 of 2009 can be confirmed only on condition of paying a cost of Rs. 20,000/- by the judgment debtors to the petitioner decree holders.

7. The present revisional application is hereby disposed of by confirming the impugned order dated 30th August, 2010 passed in Misc. Appeal No. 90 of 2009 provided the opposite party judgment debtors deposit in the executing Court or pay to the petitioner decree holders a cost of Rs. 20,000/- within six weeks from this date. If the opposite party judgment debtors fail to pay or deposit said cost of Rs. 20,000/- within the time frame as stated above, the impugned order dated 30th August, 2010 will stand recalled. However, if said cost is paid and/or deposited within the time frame then the learned executing Court should proceed with Judicial Misc. Case No. 41 of 2005 urgently and should dispose of the same preferably within a period of six weeks from the date of deposit and/or payment of said cost.

Urgent photostat certified copy of this order, if applied for, be given to the learned advocates appearing for the parties upon compliance of all necessary formalities.