

(2011) 09 CAL CK 0145
In the Calcutta High Court
Case No : C.O. No. 752 of 2011

Smt. Laboni Mukherjee and Others

APPELLANT

Vs

Sri Nirmal Kanti Guha

RESPONDENT

Date of Decision : 09-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 152, 47

Citation : (2011) 09 CAL CK 0145

Hon'ble Judges : Prasenjit Mandal, J

Bench : Single Bench

Advocate : S.K. Chakraborty and S.K. Ghosh, for the Appellant; Pradeep Kr. Tarafdar and Prasanta Kr. Roy, for the Respondent

Final Decision : Allowed

Judgement

Prasenjit Mandal, J.—Challenge is to the order dated January 31, 2011 passed by the learned Judge, Small Causes Court, 4th Bench, Calcutta in S.C.C./O.S. No. 151 of 1998.

2. The petitioners are the judgment debtors in an execution proceeding for recovery of possession and other reliefs arising out of the S.C.C./O.S. No. 151 of 1998. While the bailiff went to execute a writ of delivery of possession, the petitioners resisted and as such, the decree could not be executed. The contention of the petitioners is that the description of the suit premises was not proper. Then, they filed an application u/s 47 of the CPC and that application was rejected by the impugned order. Being aggrieved, this application has been preferred.

3. Now, the short question involved is whether the impugned order should be sustained.

4. Upon hearing the learned counsel for the parties and on going through the materials on record, I find that it is not in dispute that the decree-holder/opposite party herein got a decree for recovery of possession and other reliefs

against the petitioners in the suit being S.C.C./O.S. No. 151 of 1998. The petitioners did not prefer any appeal against the said decree. Thereafter, an application for execution of the decree was filed and the bailiff went to deliver possession of the premises in suit and then, the petitioners resisted the decree on the ground that the description of the suit premises was not proper.

5. From the materials on record, it appears that the bailiff returned the writ of delivery of possession on the ground that the description of the premises suit was not correct.

6. During the argument, Mr. S.K. Chakraborty submits that the petitioners indeed did not file any appeal against the decree dated February 22, 2002 but the description of the premises in suit was not correct and as such, his clients resisted the delivery of possession. He has also contended that his clients could file such application only when the application for execution of the decree was preferred and not before.

7. From the materials on record, it appears that since no appeal has been preferred by the petitioners against the decree for recovery of possession and other reliefs, the decree has attained finality.

8. The report of the bailiff confirms the contention of the petitioners that the description of the premises in suit was not correct and as such, he could not deliver the possession of the suit premises as per decree.

9. From the materials on record, it reveals that after such report, the decree-holder filed an application u/s 152 of the CPC praying for correction of the boundary of the premises in suit. Thus, from such conduct of the decree-holder/opposite party herein it is apparent that the schedule of the remises in suit had not been correctly recorded and there was a lacunae in the description of the premises in suit. For that reason, the decree was not executable.

10. Although, the Executing Court cannot go beyond the decree, the Executing Court is empowered to look into the matters relating to the execution, discharge for satisfaction of the decree and when the report of the bailiff shows that the decree was not executable, this Bench finds substance in the application of the petitioners. The petitioners might to resist the decree for execution of the decree when the premises in suit was not properly described. Accordingly, I am of the view that the impugned order cannot be sustained. It shall be set aside.

11. Since, the application u/s 152 of the CPC is pending for correction of the boundary of the premises in suit, this Bench is of the view that the said application u/s 152 of the CPC should be disposed of first. After disposal of the application u/s 152 of the Code of Civil Procedure, the learned Executing Court shall hear out the application u/s 47 of the CPC afresh and pass appropriate orders thereon accordance with law. The revisional application is, therefore, allowed.

12. The impugned order is hereby set aside. The learned Trial Judge is directed

to dispose of the application u/s 152 of the CPC first within a period of 30 days from the date of communication of this order to him.

13. After disposal of the application u/s 152 of the Code of Civil Procedure, he shall hear out the application u/s 47 of the CPC afresh and dispose of the same in accordance with law as early as possible.

14. Considering the circumstances, there will be no order as to costs.

15. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.