

(2023) 09 CAL CK 0035
In the Calcutta High Court
Case No : C.O. No. 2601 Of 2022

Sougata Narayan Nag And Anr.

APPELLANT

Vs

Koushik Mandal @ Mitra And Anr.

RESPONDENT

Date of Decision : 08-09-2023

Acts Referred:

Constitution Of India, 1950 — Article 227

Code of Civil Procedure, 1908 — Order 41 Rule 5(1), Order 41 Rule 5(2), Order 41 Rule 6(1)

Citation : (2023) 09 CAL CK 0035

Hon'ble Judges : Biswaroop Chowdhury, J

Bench : Single Bench

Advocate : Satyajit Mandal, Malay Dhar, Amit Bikram Mahata, Ajeya Chowdhury, Asit Kumar Hazra, Soumi Chatterjee, Animesh Samanta

Final Decision : Allowed

Judgement

Biswaroop Chowdhury, J

The petitioners are the Judgment Debtors in Title Execution Case No. 03 of 2017 pending before Learned Civil Judge Junior Division 2nd Additional Court Diamond Harbour District – South 24 Paraganas and is aggrieved by Order dated 06.07.2022 passed by the Learned Judge in the said Execution Case.

The case of the petitioners may be briefly summed up thus.

One Panchanan Mondal instituted a suit for declaration, Permanent Injunction and recovery of possession against the Petitioners/Judgment Debtors amongst others. The said suit was decreed on 28.08.2012 against the petitioners and other defendants. The petitioners being aggrieved by the Decree passed by the Learned Trial Judge preferred an Appeal before the Learned Additional District Judge Diamond Harbour being Title Appeal No-50 of 2012. The Learned Appellate Court on admitting the appeal was pleased to pass an interim order of stay against the Judgment and Decree dated 28.08.2012 passed by the Learned Trial

Court till the disposal of the appeal. On 10.07.2017 the appeal filed by the petitioners was dismissed for default. The petitioners pursuant to the order of dismissal of the appeal filed an application for restoration being Misc Case No. 06 of 2017. During pendency of the application for restoration, Execution Case arising out of Judgment and Decree dated 28.08.2012 passed by the Learned Trial Court, came up before the said Court. On 06.07.2022 when the Execution case appeared before the Learned Trial Court for verification, a petition was moved by the petitioners/Judgment Debtors for stay of the Execution Case.

The Learned Trial Court upon considering the application and hearing both sides was pleased to pass the following order.

'Heard Learned Advocates from both sides.

The instant petition filed by the JDR is taken up for consideration Considered.

That the instant petition filed by the JDR praying for stay of this instant execution case, inter alia on the following grounds:

A) That the JDR has preferred and appeal against the decree by filing a Title Appeal No. 50/2012 before the Court of Ld. Additional District Judge, Diamond Harbour.

B) Thereafter that Title Appeal transferred before Ld. Fast Track Court and on 01.07.2017 that title appeal was dismissed as none appeared on behalf of the JDR.

C) Thereafter in order to restore the Title Appeal the JDR filed a MISC Case Vide No. 06/2017.

D) That the Misc. Case still pending and the OP of the Misc Case is not filing W.O. as such the disposal of Misc Case is getting delayed.

By contending the aforesaid facts and circumstances the JDR has come up with this instant petition. On the other hand, Ld Advocate for the decree holder had raised vehement objection against the instant prayer.

After due perusal of instant application, this Court finds that there is no stay order operating against the decree which is proposed to be executed. Moreover, the JDR filed a Misc Case in the year 2017 but after lapsing of more than three years this Court finds no progression in such Misc Case. It further appears that in the previous occasion the similar kind of petition filed by the JDR and the same was rejected with cost of Rs. 500/-. Moreover it further appears that the JDR has not made any endeavour to comply the previous order of this Court. Considering entire aspect this Court inclines to hold that this is subtle endeavour, on the part the JDR to procrastinate the proceedings of this execution case.

Considering entire aspect it is

ORDERED.

that the instant application for JDR is considered and rejected on contest.

The DA is directed to verify and report this Court whether there is any stay order operating against the decree which is to be executed by this proceeding.

The petitioners on 20/07/2022 moved an application for stay of execution case before the Learned Appellate Court where restoration application for the appeal dismissed for default was pending disposal. The Learned Appellate Court was pleased to refuse the prayer for stay of execution proceedings on the ground that a prayer has been made for substitution of respondent no-1 hence no order on any other petition can be passed before disposal of the said substitution petition.

The petitioners being aggrieved by and dissatisfied with the Order No. 52 dated 06.07.2022 passed by the Learned Civil Judge Junior Division 2nd Additional Court at Diamond Harbour, District South 24 Parganas in Title Execution Case No. 03 of 2017 the petitioner has come up with this application under Article 227 of the Constitution.

It is the contention of the petitioner that the Learned Court below acted illegally in rejecting the application of the Petitioners/Judgment Debtor to stay the execution Case No. 03 of 2017. It is further contended that the Learned Court below ought to have considered about pendency of Misc Case No. 03 of 2017. It is also contended that the Learned Court below ought to have considered that Misc Case No. 06 of 2017 could not be disposed by the Learned Appellate Court due to pendency of substitution application.

Pursuant to the filing of this application notice was issued upon the opposite parties. As the opposite parties no-1 and 2/Decree holders appeared and the rest of the opposite parties did not appear pursuant to the receipt of the notice and that the opposite parties no. 1 and 2 are the main parties to be prejudiced by any order in this application the matter was taken up for hearing in the presence of opposite party no-1 and 2 and in the absence of other opposite parties.

Heard Learned Advocate for the petitioner and Learned Advocate for the opposite party no-1 and 2, perused the petition filed, written argument and materials on record. Learned Advocate for the petitioner submits that the petitioner being aggrieved by the Judgment and Decree passed by the Learned Trial Court preferred an appeal before the Learned Appellate Court and obtained an order of stay. Learned Advocate further submits that the appeal preferred by the appellant was dismissed for default for which the appellant filed an application for restoration and the same could not be disposed due to pendency of substitution application. Learned Advocate submits that the Petitioners have been in possession for decades and have constructed houses at their own cost in the suit property and if suddenly the petitioners are ousted from the property through execution the petitioners' appeal and the application for restoration will be infructuous in as much as the petitioner has a good case on merit. Learned Advocate also submits that the Learned Appellate Court be directed to dispose the Restoration Application being Misc Case No. 03 of 2017 expeditiously.

Learned Advocate for the opposite party no-1 and 2/Decree holders submits that this application has no merits. Learned Advocate further submits that the petitioner is responsible for causing delay in disposal in appeal by taking several adjournments for which the appeal was dismissed for default. Learned Advocate also submits that the Execution Case should be allowed to proceed. The following decisions are relied upon by Learned Advocate for the opposite party no -1 and 2.

Waryam Singh and Anr. Vs Amarnath and Anr. Reported in AIR 1954 SC. 215

Shalini Shyam Shetty and Anr Vs Rajendra Shankar Patil. Reported in (2010) 8 SCC P-329.

Dalmia Jain Airways Ltd. Vs Sukumar Mukherjee Reported in AIR-1954 Cal-193.

Jai Singh and ors. Vs Municipal Corporations of Delhi. Reported in (2010) 9 SCC. P-385.

Upon hearing the Learned Advocates and considering the facts of the case this Court is of the view that before proceeding to consider the validity of the order passed by the Learned Trial Judge it is necessary to consider the power and procedure to be followed by Executing Court when an appeal is pending.

Order 41 Rule 5(1) of the Code of Civil Procedure provides that 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.

Rule 6 Sub-Rule 1 of Order 41 CPC provides that where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

Upon perusing the relevant provisions contained in Rule-5 Sub-Rule-1, Sub-Rule-2 of Order 41 of the Code of Civil Procedure and Rule-6 of the said order it will appear, that although filing of an appeal does not operate as a stay of proceedings under a decree or order appealed from but the appellate Court or the executing Court may upon sufficient cause to be shown by the appellant/Judgment debtor and upon imposing condition stay the execution of the decree.

In the instant case appeal was preferred by the Petitioners/Judgment Debtors against the Judgment and Decree dated 28/08/2012 passed by the Learned Trial Court, and order of stay was obtained by the Judgment Debtor, till the disposal of the appeal. The said appeal was dismissed for default, for which an application

for restoration was filed by the Petitioners/Judgment Debtor which is pending till today. It is the contention of the Petitioners/Judgment Debtor that the application for restoration could not be disposed as an application for substitution was pending for disposal.

Upon hearing the Learned Advocates and considering the facts of the case this Court is of the view that although there was no stay of the execution proceedings passed by the appellate Court but the fact that an appeal was already preferred by the Petitioners/Judgment Debtor, stay obtained and thereafter the appeal being dismissed not on merits but for default for which an application for restoration was pending disposal the Executing Court had the discretion to use the inherent powers in the interest of justice to stay the execution proceedings upon imposing condition to be complied by the judgment debtor. In the alternative the execution Court had the discretion to grant a reasonable time to Petitioners/Judgment Debtors to obtain necessary orders from the appellate Court.

It is well settled that Courts have inherent power to do justice and prevent the abuse of the process of Court. In the instant case the Learned Executing Court ought to have granted reasonable time to the Petitioners/Judgment Debtors to obtain necessary Orders from the Learned appellate Court, when it was contended that due to pendency of substitution application the application for restoration could not be disposed by the appellate Court. Thus the Order of the Trial Court/Executing Court should be modified.

Thus this Revisional Application is allowed in part. Order dated 06/07/2022 passed by Learned Civil Judge Junior Division 2nd Additional Court Diamond Harbour District South 24 Parganas in Title Execution case No. 03 of 2017 Stands modified to the extent that the Learned Court shall fix date for consideration of the execution case and proceed with the same not before three months from date. Learned Additional District Judge Fast Tract Court - I Diamond Harbour is requested to dispose the Misc case 03 of 2017 in connection with Title Appeal No-50/2012 within 6 weeks from the date of communication of this order without granting unnecessary adjournment. It is however made clear that the Petitioners/Judgment Debtors shall pay the cost of Rs. 500/- directed earlier by the executing Court on the next day fixed.

This application stands disposed.

Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.