

GAHC010196322022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/230/2022

BARNALI KALITA AND ANR
W/O. SRI JAYANTA DAS,

2: JAYANTA DAS

S/O. SRI THANESWAR DAS
BOTH ARE R/O. FLAT NO.A-13
5TH FLOOR
AMRITKUNJ APARTMENT
LAKHI NAGAR
GUWAHATI-781003

VERSUS

SURAJIT GOVINDA BARUAH
S/O. LT. TULSI GOVINDA BARUAH, R/O. RAJGARH ROAD, BYE LANE NO.1,
HOUSE NO. 6, P.S. CHANDMARI, GUWAHATI-781003.

Advocate for the Petitioner : MR T H HAZARIKA

Advocate for the Respondent : MD. A HASSAN

BEFORE
THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY
ORDER

24. 02. 2023

Heard Mr. S Banik, learned counsel for the petitioners. Also heard Mr. G

Baishya, learned counsel for the respondent.

2. The present application under Article 227 of the Constitution of India is filed assailing the order dated 02.05.2022 passed by the learned Munsiff No. 3, Kamrup (M) at Guwahati in Title Execution case No. 28/2021 and all subsequent orders passed in the said case whereby the writ of execution was issued against the petitioners by the learned Munsiff No. 3, Kamrup (M) at Guwahati.
3. The background fact till filing of the present petition can be summarized as follows:
 - I. The respondent plaintiff instituted a suit being TS No. 54/2019 against the petitioners before the learned Munsiff No. 3, Kamrup (M) for decree of ejectment and recovery of arrear rent etc.
 - II. Though the petitioners appeared before the learned trial court on receipt of summon, however, they did not file any written statement. Accordingly, the matter proceeded ex-parte against the present petitioners.
 - III. Finally, the learned trial court decreed the suit vide judgment and decree dated 05.08.2021.
 - IV. In the meantime, the plaintiffs approached the executing court by initiating execution case No. 28/2021 for execution of the decree.
 - V. The tenants i.e. the present petitioners approached the learned first appellate court i.e. learned Additional District Judge No. 2 assailing the ex-parte judgment and decree. However, while approaching the appellate court there was delay.

VI. In the meantime, due to change of jurisdiction by virtue of amendment of the Bengal Agra and Assam Civil Courts Act, 1887, the appeal filed by the petitioners was transferred to the learned court of Civil Judge No. 3, Kamrup (M) at Guwahati for disposal after re-registration of the same.

VII. In the meantime, the execution proceeding started and as discussed hereinabove, the petitioners are now challenging the order dated 02.05.2022 and all subsequent orders and the execution proceeding itself, in the present revision petition.

4. Before dealing with the reason and ground assailing such execution proceeding let the orders passed by the learned Executing Court be quoted in the present order:

“14.03.22

Decree Holder is represented. Original CR has not been tagged yet. Tag the original CR of TS 54/19. DA to do the needful. Fix 2/5/22 for tagging for original CR.

2/5/22

Decree Holder is represented. Heard the Ld. counsel for Decree Holder. Original CR of TS 54/19 has been tagged. Issue notice to the JD. DH to take steps. Fix 9/6/22 for report.

9/6/22

Decree Holder is represented. Seen the S/R of Writ issued upon the J.D. wherein it is stated that the writ could not be executed due to lack of co-operation of the DH. As such, the DH is directed to co-operate with 'Civil Nazir', Kamrup Metro for execution of writ. Re-issue the writ. Fix 8/7/22 for report.

8/7/22

Decree Holder is represented. The Report by 'Civil Nazir', Kamrup (M) is received with an endorsement stating that the decree cannot be executed without the assistance of police. D.H is to take steps. Fix 16/8/22 for steps/ N.O.

16/8/2022

The Decree Holder is represented. The D.H submitted the challan receipt for police guard for execution of the Decree. Accordingly, 'Civil Nazir', Kamrup (M) is directed to do the needful in this regard. Re-issue the writ. Fix 6/9/22 for report."

5. The petitioners i.e. tenants also filed an application under Section 47 CPC, in the execution proceeding, however, same was withdrawn.
6. The execution proceeding and the aforesaid orders are now being challenged on the following counts as urged by Mr. Banik, learned counsel.
 - I. Order 21 Rule 10 empowers a decree holder to initiate an execution proceeding, however, by virtue of Sub-rule 2 of Rule 11 of Order 21, the petitioners in an execution case is to declare whether there is any appeal pending and purpose of such provision is to enable the executing court to properly exercise its jurisdiction under Order 21 Rule 28.
 - II. Relying on Order 21 Rule 24, Mr. Banik contends that in term of Rule 24 of Order 21, a duty is cast upon the executing court to have satisfaction, whether to proceed with the execution after considering any fact of pendency of any appeal.
 - III. Heavily relying on provision of Rule 26 of Order 21, Mr. Banik contends that the said provision enables a judgment debtor to seek

a stay of the proceeding for a reasonable time and the executing court is empowered to grant such reasonable time.

- IV. He further contends that as the application for the petitioners for condonation of delay in connection with the appeal is pending, the reasonable time in the given fact of the case will be till admission of the appeal after the condonation of delay and till such time the executing court, knowing very well that already an appeal is pending with an application for condonation of delay, would not have passed the impugned order and would have reasonably waited for the such admission.
 - V. Mr. Banik to a pointed query of this court, submits that they have not filed any application under Order 21 Rule 26, however, the learned counsel submits that when the court came to learn about the pendency of the appeal through the application filed under Section 47, the court would have applied its mind under Sub-rule 26 of Order 21 and would have awaited for a reasonable time to proceed with the execution.
7. This court is afraid if such an interpretation is given to the Rule 26 of Order 21, the provision of Order 41 Rule 5 of the CPC shall become futile. The Hon'ble Apex Court in the case of ***Atma Ram Properties (P) Ltd. –Vs- Federal Motors (P) Ltd.*** reported in ***2005 1 SCC 705*** while dealing with the provision of Order 41 Rule 5 of the CPC held that mere preferring of an appeal does not operate as stay of decree or order appeal against nor on the proceeding in the court below. It was further held that a prayer for grant of stay of proceeding or of the execution of decree or the order appeal against has to be specifically made to the appellate Court and the

appellate Court has discretion to grant an order of stay or to refuse the same.

8. Order 21 Rule 26 of the CPC enables the Executing Court to stay the execution of decree for a reasonable time if sufficient causes are shown. Purpose of such provision is to enable the judgment debtor, to apply to the appellate Court of jurisdiction for stay of the execution. Further the Executing Court is also empowered under Order 41 Rule 5 (2) of the CPC to stay an execution of an appealable decree before the expiration of the time allowed for appeal therefrom on sufficient cause being shown. Thus the reasonable time as envisages under Order 21 Rule 26 of the CPC shall mean the period of limitation prescribed for preferring an appeal. However, such power within such reasonable time can be exercised if sufficient causes are shown. In the case in hand, admittedly, the appeal is preferred beyond the prescribed period of limitation, no application has been filed before the Executing Court for stay of the execution of decree under any of the aforesaid provisions of law.
9. An application under Order 47 of the CPC was filed and withdrawn and the appellant approached this Court under Article 227 of the Constitution of India straightway challenging whole execution process inasmuch as alleging that the Executing Court has not given reasonable time, though, no application whatsoever, was filed before the Executing Court. Therefore, for the reasons discussed hereinabove, the arguments advanced by Mr. Banik, learned counsel for the petitioner is hereby rejected.
10. From the facts as narrated hereinabove, and the conduct of the appellant, this Court is of the view that the present is a frivolous petition and in

abuse of process of law. Accordingly, the present petition is dismissed having no merit with a cost of Rs. 15,000/-.

11. The cost be deposited before the Gauhati High Court, Legal Services Committee within a period of three weeks from the date of receiving of certified copy of this Order.

JUDGE

Comparing Assistant