

**Circuit Bench of Calcutta High Court
at Jalpaiguri**

07 27.08.
sm 2019

C.O. 44 of 2019

**Manoranjan Sarkar & Another
Versus
Bablu Das & Others**

Ms. Suman Sehanabis (Mandal),
Mr. Subit Kumar Mondal.
.....for the petitioners.

Mr. Amalesh Roy.
.....for the respondent no.1 to 4.

Mr. Narendra Nath Das,
.....for the respondent no.24.

The petitioners submit that service has been effected on all the opposite parties. The petitioners are directed to file their affidavit in service during the course of the day.

It is submitted on behalf of the petitioners that, despite having taken out a substantive application under Order I Rule 10 of the Code of Civil Procedure asserting their independent rights in an execution proceeding, arising from a suit of declaration of title, permanent injunction and mandatory injunction, the executing court not only dismissed such application but also the connected application for stay summarily, without going into the merits of the contention of the petitioners.

Learned counsel for the decree holders/contesting opposite parties no.1 to 4 submits that the claim of the petitioners was beyond the scope

of the suit and as such the executing court rightly refused the prayer for addition of parties. It is submitted that the decree holders' claim was restricted against the defendants/judgment debtors in the suit and it was claimed that the judgment debtors, being Bargadar, had made illegal construction on the suit property, for which the decree of declaration of the plaintiff's title was passed, along with the decrees of permanent injunction and mandatory injunction for removal of the construction raised by the defendants/judgment debtors.

However, on perusal of the application filed by the petitioners, it is evident that the application filed by the petitioners under Order I Rule 10 of the Code of Civil Procedure was substantively under Order XXI Rules 97- 101 of the Code, agitating the petitioners' independent rights and not through the defendants. As such, since it is well settled that a wrong quotation of law cannot debar the court from exercising the jurisdiction which is otherwise available to it, the executing court ought to have decided the application filed by the petitioners under Order I Rule 10 of the Code by treating the same to be one under Order XXI Rules 97-101 of the Code of Civil Procedure, on merits and upon hearing both sides. The executing court having not done so, the impugned order is vitiated by patent illegality and jurisdictional error.

Accordingly, C.O. No. 44 of 2019 is allowed, thereby setting aside the impugned order and directing the executing court to decide the application filed by the petitioners under Order I Rule 10(2) of the Code of Civil Procedure afresh, by treating the same to be one under Order XXI Rules 97-101 of the Code of Civil Procedure and to dispose of the same upon hearing both sides, without being influenced by any of the observations made herein or in the impugned order. The petitioners are given liberty to file a fresh application for stay before the executing court, upon which the said court will consider such prayer for stay and ad-interim stay on his own merits in accordance with law without being influenced in any manner by the observations made in the impugned order.

There will be no order as to costs.

Urgent photostat certified copy of this order, if applied for, shall be given to the parties upon compliance of usual formalities.

(Sabyasachi Bhattacharyya, J.)

