

17.12.2020
Sl. No.18
srm

C.O. No. 254 of 2020
Md. Arif Bhati & Ors.
Vs.
Sri Biswajit Chaki & Ors.

Mr. Anupam Kumar Bhattacharya,
Mr. Sukhendu Banerjee,
Mr. Anirban Dey,
Mr. Mritunjay Saha

...for the Petitioners.

Ms. Smita Pal

...for the Opposite Parties.

The petitioners are aggrieved by an order dated December 6, 2019 passed by the learned Civil Judge (Senior Division) at Serampore, District-Hooghly, filed in connection with Title Execution Case No.01 of 2014 arising out of the judgment and decree dated March 10, 2005 passed in Title Suit No.88 of 2001.

Records reveal that the decree was an *ex parte* decree and in the form as stated below:

“O r d e r e d.

that the suit be and the same is decree ex parte against the defendants with cost in its preliminary form. The plaintiff do get a decree of Rs.4,66,500/- including further interest @ 18% p.a. till realisation of the decretal amount subject to payment of additional court fees.

The plaintiff do get a declaration of sale of the mortgaged property as described in the Schedule-A of the plaint by public auction or private contract or otherwise.

The defendant is directed to pay the decretal amount within 3 months from the date of this order failing which the plaintiff is at liberty to recover the same by executing the decree in terms of law.”

The petitioners filed the title execution case being Title Execution Case No.1 of 2014. The opposite party who got notice of the execution case came to know of the *ex parte* decree and filed an application with the prayer before the learned Court below for allowing payment of the decretal amount along with interest. The opposite parties filed an application under IX Rule 13 of the Code of Civil Procedure for setting aside the *ex parte* decree.

From the order impugned, it appears that the application of the opposite parties/judgment debtors praying for a direction upon the decree-holder to return the title deed was allowed. The learned Court below came to the finding while disposing of the said application that as the judgment-debtor was willing to pay up the entire decretal amount along with the interest, the title deed may be returned to the judgment-debtor by depositing the same in Court. The learned Court below observed that if such direction was passed, allowing the judgment-debtor to pay up the entire decretal amount, the same would not amount to going behind the decree and the decree-holder should, in that event, file the title

deed in Court which should be returned to the judgment-debtor on payment of the decretal amount.

The learned Advocate for the petitioners submits that as the decree-holder had got a declaration for sale of the mortgage property and realisation of the decretal amount, the executing court while hearing the said application could not go beyond the decree and pass such a direction contrary to what has been decreed. The opposite parties ought to have challenged the said decree.

I am in agreement with the learned Advocate appearing on behalf of the petitioners.

The order impugned is set aside and quashed.

It is informed that an application for setting aside the *ex parte* decree has been filed. However, the same is not on record. The learned Court below is directed to hear out the application under Order IX Rule 13 of the Code of Civil Procedure for setting aside the *ex parte* decree if the same has been filed by the opposite parties as expeditiously as possible preferably within a period of one month from the date of communication of this order, upon giving an opportunity of hearing to all. Moreover, the remedy by way of an appeal was also available to the opposite parties, which has not been availed.

The opposite parties shall be at liberty to pray for an adjournment before the learned executing court so that the application under Order IX Rule 13 may be disposed of expeditiously, in case the same has been filed and is pending.

This revisional application is, thus, disposed of.

There will be, however, no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.

(Shampa Sarkar, J.)