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SK
Ct. No. 18
01.03.2021

**C.O. No. 733 of 2019
CAN 1 of 2019 (Old No. : CAN 5654 of 2019)
CAN 2 of 2020
(Via Video Conference)**

**Bhupesh Sharma @ Bhupesh Kumar Sharma
Vs.
Sekhar Nath Banerjee & Anr.**

Mr. Sounak Bhattacharya ... For the petitioner.

Mr. Rajdeep Bhattacharya,
Ms. Sevanti Roy,
Mr. Arindam Kundu ... For the opposite parties.

The petitioner has suffered an eviction decree. The said decree when put into Execution gives rise to Title Execution Case No. 13 of 2010 before the first Court of Learned Civil Judge (Senior Division) at Alipore, District- 24 Parganas (South).

The Executing Court by the order dated July 17, 2015 dismissed the said Execution case for not answering to the show cause issued by the Court.

The said order dated July 17, 2015 was recalled ex-parte by the impugned order dated November 22, 2016.

The application for recalling of the said order dated November 22, 2016 has been rejected by the Executing Court by the order dated May 05, 2018 which is also under challenge in the present revisional application.

Mr. Sounak Bhattacharya learned advocate appearing on behalf of the petitioner submits that the

execution case was dismissed in presence of the petitioner as such the petitioner is entitled to notice before restoration of the said case. He further submits that application for the restoration was filed beyond the period of Limitation prescribed under Order XXI Rule 106 of the Code of Civil Procedure, as such the Executing Court has committed a serious jurisdictional error in restoring the said Execution case ex parte that too without condoning the delay.

Mr. Rajdeep Bhattacharya, learned advocate appearing on behalf of the opposite parties on the other hand submits that the application for restoration of the said Execution case was duly served upon the petitioner but he chose not to appear, therefore, the Executing Court has rightly allowed the application for restoration of the said Execution case.

He further submits that the petitioner has participated in the Execution case after its restoration, as such, not entitled to raise the issue of limitation.

Heard learned advocates for the parties, perused the materials on record.

On July 17, 2015 the Execution case was dismissed for non-compliance of Court's order. The opposite parties on December 23, 2015 filed an application for the restoration of the said Execution Case along with an application for condonation of delay.

The Executing Court while restoring the said Execution case held that the dismissal of the Execution case was made under Section 151 of the Code, as such, the limitation is not applicable since the restoration thereof can also be made by resorting to Section 151 of the Code.

The Executing Court has completely overlooked the provisions of Order XXI Rules 105 and 106 of the Code. The opposite parties on July 17, 2015 did not appear before the Executing Court when the said Execution case was called on and the case was dismissed, the situation attracts Order XXI Rule 105(2) of the Code. Consequently for setting aside the said order of dismissal, an application is required to be filed within the time prescribed under Order XXI Rule 106(3) of the Code.

In view of the availability of the express provisions under the Code, neither the dismissal nor the restoration of the said Execution case can be made under Section 151 of the Code.

The irregularities in restoration of the Execution case does not get regularized by the participation of the petitioner in the further proceeding of the said Execution case after its restoration, particularly when such irregularities relate to the question of limitation.

The order dated November 22, 2016, for the aforesaid reason, is not sustainable and is accordingly set aside.

The Executing Court is directed to decide the application dated December 23, 2015 filed by the opposite parties for setting aside the order dated July 17, 2015 and the application for condonation of delay thereto afresh in accordance with law after giving the petitioner an opportunity to file written objection to the said applications. Such written objection be filed within two weeks from date.

The Executing Court is requested to dispose of the said applications within a period of three months from the date of communication of this order without granting any unnecessary adjournment to either of the parties.

In view of setting aside of the order dated November 22, 2016, challenge to the order dated May 05, 2018 dismissing an application for recalling of the said order dated November 22, 2016 has become infructuous.

C.O. 733 of 2019 is disposed of with the above terms. No order as to costs.

Urgent Photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Biswajit Basu, J.)