

Form No. J (2)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Biswajit Basu

C.O. 1079 of 2021
With
C.O. 1142 of 2021
With
C.O. 1143 of 2021

Sri Atish Ghosh & Anr.
-Vs-
Janasevak Trust & Ors.

For Petitioners : Ms. Sohini Cakraborty,
Mr. Pratanu Gosh,
Mr. Supriyo Ghosh,

For O.P. No. 1 : Ms. Shebatee Datta,
Ms. Krishna Mullick,

For O.P. Nos. 2 & 3 : Mr. C.K. Dutta,
Ms. Sormi Dutta,

Heard on : 19.08.2021.

Judgment On : **19.08.2021.**

Biswajit Basu, J.

1. These three revisional applications under Article 227 of the Constitution of India are arising out of the self-same execution case

between the same parties, as such, are taken up together for hearing and disposal.

2. The opposite party no. 1 in all the revisional applications filed a suit being Title Suit No. 110 of 2006 for eviction of the opposite party nos. 2 and 3 from the suit property, for decree of mesne profit and for decree of accounts. The opposite party no. 1 during the pendency of the said suit executed a deed of lease on April 18, 2008 for a period of 14 ½ years in respect of the suit property in favour of the petitioners.

3. The said suit was decreed on February 18, 2009 and the said decree when was put into execution gave rise to the Title Execution Case No. 25 of 2009 out of which the present revisional applications arise. The petitioners in the said execution case filed an application under Order XXI Rule 16 of the Code of Civil Procedure (hereinafter referred to as the 'said application' in short) for execution of the said decree in place of the original decree-holder claiming to be the assignee of the said decree by virtue of the said deed of lease.

4. The Executing Court by the order dated February 23, 2015 fixed March 19, 2015 as the date for hearing of the said application but on the said date the original decree-holder, opposite party no. 1 herein expressed his unwillingness to proceed with the said execution case, as a result thereof the Executing Court dropped the said execution case vide order dated March 19, 2015.

5. The petitioners on April 17, 2015 in the said execution case filed an application under Section 151 of the Code of Civil Procedure for recalling and/or review of the said order dated March 19, 2015. The said application was registered before the Executing Court as Misc. Case No. 1530 of 2015. The said Misc. case was subsequently transferred to the 9th Court from the 4th Court of learned Civil Judge (Senior Division) at Alipore and the transferee Executing Court by the order dated March 17, 2021 has dismissed the said misc. case, the said order is under challenge in C.O. 1079 of 2021.

6. The original decree-holder in the said execution case initiated two misc. cases being Misc. case No.1154 of 2009 and Misc. case No. 1156 of 2009 for final decree of mesne profit and for final decree of accounts respectively. The Executing Court by two separate order both dated May 21, 2016 passed in the aforementioned two misc. cases had directed the original decree-holder to show-cause as to why the said misc. cases would not be dismissed.

7. The petitioners in both the misc. cases filed two separate applications under Section 151 of the Code for recalling of the said order dated May 21, 2016 and for bringing their names on record of the said misc. cases in place and instead of the original decree-holder on the said claim of assignee decree-holder.

8. The Executing Court by two separate orders both dated March 17, 2021 dismissed the said applications and the said misc. cases as well.

The order whereby the Misc. case No.1154 of 2009 and the application thereto filed by the petitioners were dismissed is the subject matter of challenge in C.O 1142 of 2021, whereas the order passed in Misc. case No. 1156 of 2009 to the said effect is the subject matter of challenge in C.O 1143 of 2021.

9. Ms. Sohini Chakraborty, learned counsel appearing on behalf of the petitioners in all the matters submits that the Executing Court has acted with material irregularity in dropping the said execution case on a date fixed for hearing of the said application without disposing the said application, according to her, in view of such irregularity in dropping the said Execution case, the Executing Court is obliged to recall the said order but instead has dismissed the said application of the petitioners on the ground of delay in applying under Order XXI Rule 16 of the Code, which is beyond the scope of the said application for recalling and/or review of the order dropping the said execution case.

She further submits that since the entire decree has been assigned to the petitioners by the said deed of lease the petitioners are entitled to execute the decree for mesne profit and accounts also, and applied to be on records of the said misc. cases levied to execute the other parts of the said decree, which the Executing Court has erroneously denied.

10. Ms. Shebatee Dutta, learned counsel appearing on behalf of the decree-holder/ opposite party submits that her client has obtained possession of the suit property in execution of the said decree, as such,

the said application has become infructuous, therefore, no fruitful purpose would be served by re-opening the said application.

11. Mr. Nirmalya Dasgupta, learned counsel appearing on behalf of the judgment-debtors, opposite party nos. 2 and 3 herein relying on the Division Bench decision of this Court in the case of ***Smt Rajul Mukim vs. Sumermal Surana & Anr.*** reported in **AIR 2018 Cal 102** submits that the said application is not maintainable at a belated stage of execution of the said decree when the petitioners did not take any steps to implead themselves in the suit during its pendency although they are claiming to have acquired interest over the suit property during the pendency of the said suit by virtue of the said deed of lease.

12. Ms. Chakraborty, responding to the aforesaid argument of learned counsel for the opposite parties submits that being the assignee of the said decree, the petitioners are entitled to get possession of the suit property in execution of the said decree after removal of all obstruction regardless such obstruction comes from the side of the decree-holder, therefore, taking possession of the suit property by the original decree-holder is inconsequential to the fate of the said application.

She further contends that the petitioners by not impleading themselves in the suit during its pendency have not lost their right to execute the said decree as assignee thereof since such right accrues in favour of the petitioners on the suit being decreed.

Heard learned counsel for the parties, perused the materials-on-record.

13. It appears from the record that the said application was on record of the execution case when the said execution case was dropped, more so, on a date fixed for hearing of the said application. The recalling of the said order was prayed for immediately which has been dismissed by the order impugned in C.O. 1079 of 2021 on the ground that the petitioners were inactive about their right from the date of execution of the lease deed till the date when the said application was filed, this is not a relevant consideration for dealing with the application for recalling of the order dropping the said execution case.

The Executing Court ought not to have dropped the said execution case without disposing the said application and the misc. cases connected with the execution case, it is therefore rightly submitted by Ms. Chakroborty that the Executing Court has acted with material irregularity in dropping the said execution case.

14. The fact that the decree-holder has obtained the possession of the suit property in execution of the said decree will not render the said application of the petitioners infructuous inasmuch as in the event the petitioners are successful in their said application, they have other remedies available under the law to get the possession of the suit property, which not being an issue in the present matters, need not be addressed.

15. The Division Bench decision relied on by Mr. Dasgupta is entirely misplaced in the facts and circumstances of the present case. The case cited by him was a case where a purchaser of a share from a co-sharer of the joint property sought to implead herself in the proceeding for execution of the final decree of partition but was denied for her failure to take steps for being added in the suit during its pendency, the present is the claim of the assignees of a decree for execution of said decree recognized under Order XXI Rule 16 of the Code. It is preposterous to suggest that such right gets compromised on the failure of an assignee of a decree to apply under the said provision of the Code for being added in the suit during its pendency.

16. The decree under execution has three parts i.e. decree of possession, decree of mesne profits and decree of accounts. The entire decree was put into execution by the original decree-holder, notwithstanding the execution of the decree of possession, there is nothing on record to suggest that the misc. cases filed to execute the decree of mesne profits and accounts were satisfied or the original decree-holder expressed its unwillingness to proceed with the said misc. cases also.

If the petitioners succeed in their said application, they will certainly be entitled to proceed with the said misc. cases being assignee decree-holders instead and in place of the original decree-holder.

17. In view of the discussion made above, this Court is of the view that the orders impugned in the revisional applications are not sustainable and are accordingly set aside.

The application filed by the petitioners for recalling of the order dated March 19, 2015 being Misc. case No. 1530 of 2015 is allowed, consequently the order dated March 19, 2015 is recalled.

The Title Execution Case no. 25 of 2009 and the misc. cases thereto, being Misc Case No.1154 of 2009 and Misc case No. 1156 of 2009 are restored to their respective original file and number.

18. The Executing Court is directed to decide the said application and the applications filed by the petitioners in the aforementioned misc. cases afresh in accordance with law. It is made clear that this Court has not gone into the merit of the said applications; all points including the point of maintainability of the said applications are kept open.

The parties before this Court have waived service of formal notice of the aforementioned applications, as such, further notice need not be given to them.

The period stipulated in the said deed of lease since is expiring soon, the Executing Court is requested to dispose of the said applications expeditiously, preferably within a period of three months from the date of communication of this order and in doing so shall not grant unnecessary adjournment to either of the parties.

C.O. 1079 of 2021, C.O. 1142 of 2021 and C.O. 1143 of 2021 are thus allowed without any 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.)