

**CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI
APPELLATE SIDE**

**23.11.2021
Crt. No.1.
K.B./b.r.
Item No.3**

C.O. 29 of 2021

***Diamond Bio Agro Private Limited*
-Vs.-
*Smt. Fuleshari Burman & Ors.***

**Mr. Sunil Kumar Sarkar
.....for the petitioner.**

The order under challenge in this application is Order No. 26 dated 24th September, 2019 passed by the learned Civil Court (Junior Division) at Siliguri.

By the said order the application of the Decree Holder (*DHR*) filed under Section 151 of the Code of Civil Procedure (CPC) for police assistance to execute the decree was rejected by the learned Civil Court. The learned Civil Court was further pleased to observe that the application of the Judgement Debtor (*JDR*) under Section 47 of the CPC connected to the execution proceeding is pending.

Learned Civil Court stayed the execution case filed by the *DHR* being T.S. (Execution) Case No. 12 of 2016 till the decision in the application of the *JDR* under Section 47 CPC.

This Court is taken in detail through the Order No. 26 dated 24th September, 2019.

Mr. Sarkar, learned Counsel appearing for the petitioner/*DHR* submits that the learned Civil Court noticed in detail the dispossession of the *DHR* from the suit property by the *JDR* during pendency of the execution proceeding. It is submitted that having noticed such dispossession, the learned Civil Court could not have kept alive the question of delivery of possession staying the execution proceedings as sought to be raised by the *JDR* under Section 47 CPC.

It is submitted that the learned Civil Court found reasons to hold that the suit proceeded *ex parte* against the defendants for not taking steps. The suit was for declaration and permanent injunction.

The Learned Civil Court decreed the suit on the basis of uncontroverted evidence of PW-1 and PW-2. It is pointed that the learned Civil Court fell into error by failing to afford relief to the present petitioner/the *DHR* under Section 151 CPC since such a relief could be extended to the *DHR* in execution proceedings notwithstanding the provisions of Rule 32 (1) of Order 41 CPC.

Learned Counsel produces Affidavit-of-Service showing service of the copy of the application on learned Advocate for the *JDR* in compliance of the order of the Hon'ble concurrent Bench dated 18th March, 2021.

None appears to defend the stand of the Opposite Parties, the defendants to the suit/*JDR*.

Heard.

Considered.

This Court notices the judgement and decree passed by the learned Civil Court in T.S. No. 39 of 2014. From the judgement and decree it emanates that the present petitioner/the

plaintiff has exercised his right, title and interest over the suit property after purchasing the full suit land and obtaining permission from the State Government for establishing a Tea Estate over the suit land.

The defendants appeared in the suit by filing Vakalatnama but subsequently failed to take any steps.

Accordingly, the suit was decreed *ex parte*.

At this stage therefore, the defendants cannot raise any issue collaterally in the disguise of a Section 47 CPC application before the executing court. Such collateral action on the part of the defendants in the face of the order of the learned Civil Court dated 24th September, 2019 recording the outright dispossession of the plaintiff/the present petitioner from the suit property, cannot result in a conclusion that the petitioner stands prevented from enjoying the fruits of the decree merely on the basis of the defendants/*JDRs* raising questions before the executing court.

To the mind of this court, the so-called question of delivery of possession raised by the defendants/the present Opposite Parties is another attempt to delay any positive result in the execution case.

In the backdrop of the above discussion, the order impugned stands set aside.

Learned Civil Court is now directed to proceed with the execution case irrespective of the application under Section 47 CPC which stands not maintainable in the present facts.

Affidavit-of-Service filed in Court today be retained with the record.

C.O. 29 of 2021 stands thus **disposed of**.

All concerned parties shall act in terms of the copy of the order downloaded from the official website of this Court.

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

(Subrata Talukdar, J.)