

**In the High Court at Calcutta
Civil Revisional Jurisdiction
Appellate Side**

Present:-

The Hon'ble Justice Subhasis Dasgupta.

**C.O. No. 3422 of 2022
Ajay Kumar Gupta
Vs.
Radheshyam Shaw & Ors.**

For the Petitioner	: Mr. Arijit Bardhan, Adv. Mr. Debanik Banerjee, Adv. Mr. Steven S. Biswas, Adv.
For the Opposite Parties	: Mr. Partha Pratim Roy, Adv. Mr. Gautam Das, Adv. Mr. Sandeep Tiwari, Adv.
Heard On	: 28.11.2022.
Judgment	: 06.12.2022.

Subhasis Dasgupta, J:-

This revisional application under Article 227 of the Constitution of India, is directed against two orders, dated 27th September, 2022, and 11th November, 2022, passed in Ejectment Execution Case No. 176 of 2015, directing delivery of possession of decretal property to decree holder with assistance of police and Seal Bailiff, with a further direction upon the Seal Bailiff to break open padlocks, bolts and nuts, if necessary, outside and inside shutter gate and doors of the decretal premises at the time of execution.

Mr. Arijit Bardhan, learned advocate appearing for the petitioner submitted that a judgment and decree dated 16th September, 2015, passed in Title Appeal No. 14 of 2013 had been sought to be executed, which was challenged upon preferring an appeal vide S.A. No. 281 of 2016 before this Court.

Mr. Bardhan further submitted that such Second Appeal had already been admitted upon formulating substantial question of law, and granting stay of further proceedings of Ejectment Execution Case No. 176 of 2015 pending before Learned Judge, 5th Bench, Presidency Small Causes Court, Calcutta, till disposal of application for stay, subject to the fulfillment of certain conditions, as enumerated in the order itself.

Mr. Bardhan candidly submitted that there had been some laches with regard to the fulfillment of the conditions pertaining to occupational charges, as specifically disclosed in the stay order S.A. No. 281 of 2016.

According to Mr. Bardhan, the occupational charges, however, had been paid by the mother of the petitioner till November, 2018.

The mother of the petitioner challenged the decree of eviction, passed in the Title Appeal No. 14 of 2013, preferring S.A. No. 281 of 2016. Ultimately, the mother of the petitioner died on 24th October, 2022. The petitioner happens to be the son of the deceased mother, and a daughter are the only legal heirs of the appellant vide S.A. No. 281 of 2016.

Upon furnishing such inputs regarding the death of the mother of petitioner, Mr. Bardhan contended that the impugned orders, under

challenge, intended to execute the decree, could not be allowed to be executed, as order had been passed against a dead person.

Argument was further raised by Mr. Bardhan that when CAN application had been filed in connection with S.A. No. 281 of 2016, wherein the petitioner had already been arrayed as a party, with a prayer for substitution and/or transposition of the petitioner to the category of appellant, instead of his deceased mother/appellant, pending decision of such CAN application, the decree could not be allowed to be executed.

Argument was also raised by Mr. Bardhan that there had been false statement made in affidavit filed, as evident from order dated 27.9.2022, that there had been no appeal pending in higher forum, and for such mis-statement, decree should not be executed.

Incidentally, it was submitted by Mr. Bardhan that arrears of occupational charges, in terms of the order dated 7th August, 2018, passed in S.A. No. 281 of 2016, even could be directed to be deposited by the petitioner, to which the petitioner had no objection, upon consideration of his lack of knowledge of pending execution proceedings.

Mr. Partha Pratim Roy, learned advocate appearing for the opposite parties/decreed holders, replied upon advertizing to a copy of the execution application filed before the court below, that there had been deliberate violation of conditions of stay order, passed in S.A. No. 281 of 2016, and when the petitioner himself was one of the parties to the execution proceedings, as judgment-debtors, plea of ignorancy was nothing but a ploy to frustrate the decree granted in this case.

Mr. Roy further contended that there had been two appeals preferred, challenging the decree granted by the First Lower Appellate Court, one by the mother of the petitioner vide S.A. No. 281 of 2016, and another by petitioner/son being S.A.T. No. 583 of 2015. Such appeal, according to Mr. Roy, could not be admitted as yet.

It was thus argued by Mr. Roy that when the mother of the petitioner getting the petitioner/son impleaded in her appeal as proforma opposite party No. 3 vide S.A. No. 281 of 2016, filing of another Second Appeal, by the son, though not admitted as yet, was highly purposive.

Mr. Roy further contended that Misc. Case filed under Section 47 of Code of Civil Procedure in the pending Execution Case had already been dismissed for not taking steps, since long.

Order granting police help for execution of the decree having already been passed in the meantime, and when there had been apparent violation of the conditions of stay granted by Division Bench of this Court in S.A. No. 281 of 2016, there left no impediment to execute the decree, Mr. Roy argued, supporting the order of court below.

Now it is for the Court to address the issues raised, as to whether the orders passed by the court below are sustainable or not.

It would be profitable here to mention the conditional order of stay granted in S.A. No. 281 of 2016 at the time of admission of appeal, which may be set out hereinbelow:

“All further proceedings of Execution Case No. 176 of 2015 pending before the learned Judge, 5th Bench, Presidency Small

Causes Court, Calcutta will remain stayed till the disposal of the application subject to fulfillment of the following conditions: -

- (i) All arrears of occupational charges up to the month of August 2018 at the rate of last deposit will have to be deposited by the appellant in the Executing Court by the last day of September 2018.*
- (ii) Occupational charges for the following months i.e. from September 2018 till the disposal of this application will be deposited by the appellant at the rate of Rs. 15,000/- (rupees fifteen thousand only) per month with the learned Executing Court. First of such deposit for the month of September, 2018 will be deposited in the Executing Court within 7th of the following month i.e. 7th October, 2018 and for the following months within 7th of each following month in the Executing Court.*
- (iii) In case, such deposit is made regularly, the stay will continue till the disposal of this application with this rider that in the event the appellant commits any default in complying with any of the conditions, as mentioned above, including the condition for deposit of occupational charges for any single month, the stay, as granted above, will stand automatically vacated and in that event, the learned Executing Court will be free to proceed with the execution case.”*

A bare look to such conditional order of stay together with order of admission, as disclosed by the petitioner, it appears that there has been apparent violation of such conditional order of stay.

The settled proposition of law is quite clear that mere filing of a Second Appeal would not itself operate as stay to the execution proceedings, if already levied in the meantime.

The Second Appeal being S.A.T. No. 583 of 2015 filed by petitioner/son of the deceased mother has not yet been admitted.

There has been a huge accumulation of occupational charges in the meantime for the apparent violation caused to the conditional order of stay in Second Appeal No. 281 of 2016. The petitioner/son is one of the parties to this instant execution proceedings pending before the court below. The deceased mother of the petitioner and the petitioner/son stay in the same house property.

The CAN application for the desired purpose of petitioner, as disclosed hereinabove, was filed on 23rd November, 2022.

The Misc. Case No.17 of 2017, filed by the deceased mother of the petitioner, under Section 47 of C.P.C. in connection with instant execution proceeding, for the reasons best known to the mother of the petitioner could not be proceeded further in accordance with the law, taking appropriate steps therefore, and as a result of which, the Misc. Case was dismissed on 20th December, 2021.

The mother of the petitioner contested the application under Rule 208 of the Civil Rules and Orders read with Section 151 of C.P.C. praying for execution of the decree taking police assistance, filing written objection.

The opposite parties/judgement-debtors for the reasons best known to them did not even cross-examine the witnesses, examined by the decree holder in connection with application under Rule 208 of the Civil Rules and Orders read with Section 151 of C.P.C.

For the reluctance being shown by the judgement-debtors, prayer for police help was allowed in aid of under Rule 208 of the Civil Rules and Orders read with Section 151 of C.P.C. directing the decree-holders to deposit costs of police help, after the same was ascertained from the police end.

The order granting stay in the execution proceedings as per order of Division Bench of this Court passed in S.A. 281 of 2016, was vacated by the court below on 9th April, 2021. Immediately thereafter no steps could be taken in accordance with law in connection with such Second Appeal mentioned hereinabove.

The mother of the petitioner died on 24th October, 2022. The moment when the stay order was vacated by the court below, she was very much alive.

In a situation like this, this forum may not be allowed to be opened leaving a chance for a conflicting decision to come, manifestly when there has been utter violation of conditional order of stay vide S.A.281 of 2016.

The impugned orders, as such, do not call for any interference for the reason disclosed hereinabove.

The executability of the decree against a dead person, as claimed by the petitioner, may be considered by the executing court below in accordance with the law, if at all raised.

Regarding the mis-statement made in affidavit, as alleged, this Court is of the view that this is matter of record, and it leaves no scope for any interpretation.

The revisional application stands dismissed, and accordingly disposed of.

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

(Subhasis Dasgupta, J.)