

05.06.2023
Sl. No.17(ML)
srm/CP/GB

C.O. No. 1192 of 2023
With
CAN 1 of 2023
With
CAN 2 of 2023
Zubaida Hamid
Vs.
Sunil Shaw

Mr. Aniruddha Chatterjee,
Mr. Wasim Ahmed,
Mr. Md. Kashif

...for the Petitioner.

Mr. Tapas Kumar Mandal,
Mr. Mritunjay Saha

...for the Opposite Party.

Mr. Uday Sankar Bhattacharyya
...for the Applicant in CAN 1 of 2023.

The petitioner is the decree-holder in an ejectment suit, being Ejectment Suit No.10 of 2016. The premises in question is Premises No.B/168/A/H/1, Tiljala Road, Kolkata-700046. The decree was passed on contest and the defendants were directed to handover vacant and khas possession of the suit property as described in the schedule of the plaint in favour of the plaintiff, within sixty day from the date of passing of the judgment.

The schedule of the plaint is quoted below:

“SCHEDULE ABOVE REFERRED TO

All That tiled roof structure and tannery at premises No.B/168/A/H/1, Tiljala Road, Kolkata-700046 butted and bounded in the manner as follows:

On the East : By the Tannery of Chatter Ram;

On the West : By a drain thereafter common passage;

On the North : By common passage;

On the South : By the Tannery of Asha Ram & Dhanu Ram.”

The tenancy as per the plaint was in respect of one tiled roof structure and tannery.

Challenging the aforementioned decree, the defendants/judgment-debtors preferred an appeal being Ejectment Appeal No.78 of 2016.

The opposite party, alleging that the decree-holders were attempting to execute the decree against Premises No.168A, Tiljala Road, Kolkata-700046, filed an application under Order XXI Rules 98 to 101 of the Code of Civil Procedure, in Ejectment Execution Case No.10 of 2016 arising out of Ejectment Suit No.39 of 2005. The said application was registered as Misc. Case No.81 of 2019.

In the said application, the opposite party claimed to be a tenant under one Rashida Hamid. According to the opposite party, Rashida was the owner of Premises No.168A, Tiljala Road and the landlady of the said opposite party. The opposite party was running a leather business from the said premises, upon obtaining trade licence from the Kolkata Municipal Corporation. The electricity connection from the CESC authority had also been provided.

In the Misc Case 81 of 2019, the opposite party alleged that Zubaida Hamid, obtained an eviction decree against Ramlal and others, in respect of a separate and distinct premises and not premises No.168A, Tiljala Road. Yet, she was attempting to execute such decree against the premises of which the opposite party was the tenant, under Rashida Hamid and not the decretal premises.

The opposite party prayed that the men and agents of Zubaida Hamid should be restrained from disturbing the business of the opposite party and should further be restrained from ousting the opposite party and his business from the premises No.168A, Tiljala Road by wrongly executing the decree in respect of premises No. B/168/A/H/1, Tiljala Road.

The opposite party also filed an application under Section 151 of the Code of Civil Procedure and prayed for stay of all further proceeding in Ejectment Execution Case No.10 of 2016 arising out of Ejectment Suit No.39 of 2005. According to the opposite party, Premises No.168A, Tiljala Road was a thika property and the decree was passed as the court was misled by Zubaida Hamid. It is also submitted that by an order dated July 6, 2022 Zubaida Hamid was restrained from dispossessing the petitioner.

The facts are that the eviction decree was obtained by the petitioner Zubaida Hamid against one Ramlal and

others. The decree was challenged by the judgment debtor before the learned District Judge vide Ejectment Appeal No. 78 of 2016. Rashida Hamid was the constituted attorney of the Ramlal and orthers (judgment debtor). In the said Ejectment Appeal, an order of stay was granted in favour of the appellant therein on the condition of payment of occupational charges of Rs.50,000/- per month to the decree holder.

The said order was vacated due to non-compliance.

Sunil Shaw the opposite party claiming to be a tenant under Rashida Hamid, filed the Misc. Case being No. 81 of 2019 along with an application for stay.

While deciding the application for stay, the learned executing court by an order dated September 22, 2022, held that as Sunil Shaw claimed himself to be the tenant of Rashida Hamid, the constituted attorney of the some of the judgment debtors and was residing in the decretal premises, he had the same obligation to pay the occupational charges for being in occupation and possession of the property. It was also observed that Ramlal had surrendered the tenancy to Rashida Hamid and Rashida Hamid had inducted Sunil Shaw therein.

The learned executing court took into consideration the order dated March 20, 2021 and July 6, 2022 and found that the order dated March 20, 2021, clearly stated that the said order would not operate as a

stay over the execution proceeding. By the order dated July 6, 2022 the opposite party was protected to the extent that Zubaida Hamid was directed not to disturb the peaceful possession of the opposite party in respect of the case property.

From the records, it was clear to the learned executing court that the opposite party was in occupation of the decreetal property and the decree holder was entitled to enjoy the fruits of the decree. The court observed that stay of the execution of the decree should be subject to payment of the occupational charges and the decree holder should not be deprived in any way from proceeding with the execution only on the ground that an application under Order XXI Rules 98 to 101 of the Code of Civil Procedure was pending. The court found that it was an admitted position that the opposite party was in possession of the decreetal property and was enjoying the tenanted portion without paying anything to the decree holder.

Thus, the court held that the opposite party was liable to pay the occupational charges to the petitioner till the date of his occupation or till the disposal of the Misc. Case. So far as the amount of occupational charges was concerned, the court found Rs.50,000/- per month as the reasonable amount. In the Ejectment Appeal from the decree No.78 of 2016 a stay of execution had been granted provided that an amount of

Rs.50,000/- was paid by the judgment debtor. The execution court followed the said order as far as occupational charges was concerned. The said amount was directed to be paid within 15th of every month till the opposite party continued in possession of the decretal property. The arrear occupational charges from the date of filing the Misc. Case, i.e., May 28, 2019 was directed to be paid within four months from the date of the order, i.e., September 22, 2022. It was directed that in case of default in payment of the occupational charges, the stay order would automatically stand vacated and the execution case would proceed.

As the opposite party failed to pay the amount of Rs.50,000/- as directed the order as directed on September 22, 2022 by the executing court, the petitioner prayed that the execution should proceed. The execution proceeded and the petitioner filed an application for execution of the decree through police help. The said application under Order 21 Rule 97 of the Code of Civil Procedure was registered as Misc Case No.208 of 2017. By an order dated January 18, 2013, the Misc Case No.208 of 2017 was allowed. The order for police help was granted.

The opposite party preferred an appeal being Misc. Appeal No. 30 of 2023. The appeal was heard by the learned Additional District Judge, 14th Court at Alipore, who stayed the operation of the order of execution

through police help, till the disposal of the appeal. Such order dated March 22, 2023 is under challenge in this application.

This court is of the view that when the learned executing court had found that the opposite party was in possession of the property in question without paying a single farthing to the decree holder and had directed payment of Rs.50,000/- per month, with a default clause that the execution proceeding would continue in case of default in such payment, the learned Additional District Judge, 14th Court, Alipore ought to have taken into consideration such aspect and granted the stay on condition that such occupational charges were paid.

A Title Appeal was filed by the defendants. Rashida Hamid through whom the opposite party claimed to be in possession as a tenant in respect of the property in question is the constituted attorney of the judgment debtors. The appeal court had also directed that Rs.50,000/- to be deposited, if the operation of the judgment and decree is stayed.

This court is of the view that the learned Additional District Judge, 14th Court at Alipore could not have allowed the stay of the order of execution through police help, without directing payment of Rs.50,000/-

Under such circumstances, the interim order dated March 22, 2023 passed by the learned Additional District Judge, 14th Court at Alipore is erroneous and

contrary to law as also contrary to the orders passed earlier in the proceedings, and is set aside. The order dated September 22, 2022 directing payment of occupational charges as a pre-condition for stay of the execution proceeding, has neither been set aside nor stayed by any competent court and has attained finality. The merits of the said order is not under challenge before this court and this court cannot reappreciate the evidence or the contentions of the opposite party which would amount to deciding Misc Case No.81 of 2019. The execution of the decree through police help shall remain stayed provided the opposite party pays Rs.50,000/-, month by month, within 15th of every month and the arrears on and from the date of the application, i.e. May 28, 2019 till May 2023 are paid in six equal monthly instalments.

First of such instalments shall be paid along with the occupational charges for the month of June, 2023, within June 20, 2023. Thereafter, on and from July, 2023 the occupational charges shall be paid along with the instalments. The payment of occupational charges shall be made till the petitioner is in possession of the decretal property or until further orders that may be passed in the execution proceedings or by any competent court.

The stay application, pending before the learned Additional District Judge, 14th Court at Alipore in Misc.

Appeal No.30 of 2023, is accordingly disposed of. The hearing of the appeal must be expedited.

As the opposite party prays that the Misc appeal be disposed of within a month from date, the same shall be disposed of in accordance with law within the aforementioned period. The Misc appeal shall proceed on other points and not on the issue decided by this court.

In case of default, the petitioner can proceed with the execution strictly in accordance with law and subject to any orders that may be passed by any competent court or by the executing court in any proceeding.

It is informed to the Court that the order dated September 22, 2022 has been challenged by the opposite party by way of a revision before the learned District Judge. There are no records in support of such contention. This Court directs that if any revisional application has been filed and the same is entertained and allowed by holding that the petitioner was not required to pay Rs.50,000/-, the amount paid as per direction of this court shall be refunded to the opposite party by the petitioner, before the petitioner can proceed with the execution.

The revisional application is accordingly disposed of.

In view of disposal of the revisional application, CAN 1 of 2023 and CAN 2 of 2023 are also disposed of.

The opposite party shall be at liberty to take all the points raised before this learned court at the appropriate stage in an appropriate proceeding.

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

Parties are to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)

Later:

The order is delivered in open Court. The learned advocate for the opposite party prays for stay of operation of the order. The same is considered and rejected.

(Shampa Sarkar, J.)