

07.08.2023
Sl. No.211&212(ML)
srm

C.O. No. 1973 of 2023
With
C.O. No. 1975 of 2023
Smt. Belarani Mahapatra
Versus
Arati Das & Ors.

Mr. Gaurav Purakasta,
Mr. Biplab Majumder

...for the Petitioner.

These two matters are taken up together as the issues involved are similar, arising out of the same suit, between the same parties.

C.O. No.1973 of 2023 has been filed challenging an order dated June 10, 2022 and C.O. No.1975 of 2023 has been filed challenging an order dated March 21, 2023. Both the orders were passed by the learned District Judge at Howrah in Misc. Appeal No.180 of 2019.

By the order dated June 10, 2022, the learned lower appellate court passed a direction upon the learned executing court, not to physically evict the appellants.

Misc. Appeal No.180 of 2019 was filed along with an application for condonation of delay of 2736 days in preferring the said appeal. The application under Section 5 of the

Limitation Act was allowed by the order dated March 21, 2023 and the stay which was granted by the learned appellate court was extended.

The background of the case is that an eviction suit was filed by the petitioner being Title Suit No.224 of 2000. The suit was decreed *ex parte* by the learned Civil Judge (Junior Division), 4th Court at Howrah sometime in 2005. The petitioner filed Title Execution Case No.04 of 2005. The opposite parties filed a misc. case under Order IX Rule 13 of the Code of Civil Procedure for setting aside the *ex parte* decree. The misc. case was rejected. Against the order of rejection, Misc. Appeal No.50 of 2006 was filed which was allowed on contest. The order passed in misc. appeal was challenged before the High Court by civil revisional application being C.O. No.3374 of 2008. The High Court set aside the order passed in misc. appeal. The *ex parte* decree was not set aside. The Hon'ble Apex Court also, did not interfere with the decision of the High Court passed in the civil revision. Thus, the application under IX Rule 13 stood rejected at every stage and the *ex parte* decree became final.

The opposite parties thereafter filed Misc. Case No.20 of 2009, being an application under Order XXI Rules 100 and 101 of the Code of Civil Procedure. The same misc. case was dismissed for non-prosecution. Being aggrieved by such order

dated May 10, 2012, the opposite parties preferred civil revision No.06 of 2012 before the learned District Judge at Howrah. The said civil revision 06 of 2012 was transferred to the court of the learned Additional District Judge, 2nd Court at Howrah. The civil revision was dismissed on contest on July 20, 2019.

Aggrieved party approached the High Court by filing C.O. No.2945 of 2019. The High Court while disposing of the revisional application made the following observations and passed necessary orders, which are quoted below:

“It appears at the outset that the revisional application was not maintainable in view of availability of an equally efficacious alternative remedy in the form of an appeal, by virtue of operation of Rule 103 of Order XXI of the code, which deems such an order of the executing court as a decree, thereby making it appealable.

Accordingly, the revisional court acted without jurisdiction in entering into the merit of the matter, although otherwise the revisional court did not have jurisdiction to entertain the matter.

Accordingly, C.O. No.2945 of 2019 is disposed of on contest, thereby setting aside the order of the revisional court on the ground that the said court had no jurisdiction to enter into the merits of the matter, leaving it open to the petitioners to challenge the original order passed by the executing court dated May 10, 2012 in a properly constituted appeal before the appropriate forum, subject to condonation of delay, which may have intervened in preferring such an appeal.”

On the strength of the order of the High Court, the Misc.

Appeal No.180 of 2019 along with a prayer for condonation of delay and admission of the misc. appeal, was filed. During pendency of the same, a limited stay from evicting the

judgment debtor from the property in the execution proceeding was passed. Upon considering the oral evidence of the witnesses and explanation for the delay as also the factual matrix of the case, the learned lower appellate court allowed the application under Section 5 of the Limitation Act and extended the stay which was granted by order dated June 10, 2022. The court found that the delay of 2736 days occurred due to consumption of a considerable time during the pendency of the civil revision before the learned District Judge, which was not maintainable under the proviso to Section 115 of the Code of Civil Procedure and also on account of pendency of the revisional application before the High Court.

The condonation was sought for the period between which the application was pending before the learned Additional District Judge, 2nd Court at Howrah and the Hon'ble High Court. Accordingly, the delay was condoned.

Thus, this Court is not inclined to interfere with the order impugned simply for the reason that the delay occurred as the opposite parties were pursuing the civil revision before a wrong forum and thereafter before the High Court.

With regard to the extension of stay, this Court is of the view that the learned Additional District Judge, Fast Track (1st Court), Howrah has extended the interim order, which was already passed on June 10, 2022, directing the executing court

not to physically evict the judgment debtors. If such protection was not given, the misc. appeal would become infructuous.

This Court does not find any reason to interfere with either of the orders as the learned court below only restricted eviction. The High Court had granted liberty to the judgment debtors to challenge the order passed in the application under Order XXI Rules 100 and 101 of the Code of Civil Procedure, by preferring an appeal. Hence, the misc. appeal was filed. The claim for occupational charges with all arrears, ought to have been made before the learned lower appellate court which granted the stay. This prayer is not entertained solely for the reason that this prayer was not made before the learned lower appellate court. The petitioner is at liberty to make such prayer before the learned lower appellate court and the learned lower appellate court shall decide such issue in accordance with law, upon giving the parties adequate opportunity to contest.

Moreover, it is made clear that the misc. appeal should be disposed of within a period of three months from the next date fixed.

Both the revisional applications are, thus, disposed of.

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.)