

23.08.2023
Court No. 19
Item No.20
CP

C.O. 2693 of 2023

Zubaida Hamid

Vs.

Sunil Shaw

Mr. Aniruddha Chatterjee

Mr. Wasim Ahmed

Mr. Md. Kashif

...for the petitioner.

Mr. Asoke Banerjee, Sr. Advocate

Mr. Sudhakar Thakur

Mr. Tapas Mondal

Mr. Mritunjoy Saha

....for the opposite party.

This revisional application has been filed challenging an order dated August 3, 2023, passed by the Additional District Judge, 10th Court at Alipore in Misc. Appeal No. 30 of 2023. The said misc. appeal arose out of an order dated January 18, 2023 passed in Misc. Case No. 208 of 2017. Misc. Case No. 208 of 2017 arose out of Ejectment Execution Case No. 10 of 2016.

By the order impugned, the learned court below held as follows:

“That the misc. appeal 30 of 2023 is allowed on contest but without any order as to costs.

The impugned order passed by the ld. Executing Court on 18.01.2023 in misc. case no. 208 of 2017 is set aside.

The ld. Executing court shall analogously hear and dispose of by a common order Misc. Case 208 of 2017 and misc. case 81 of 2019

within one month from the date of receiving the case records.

The LCR along with a copy of this judgment is to be sent back to the ld. Executing court (ld. 2nd court of Civil Judge (Jr. Div) Alipore forthwith. Parties are directed to appear before the ld. Executing court on 05.08.2023 for necessary instructions/settling of dates for hearing.”

Mr. Chatterjee, learned Advocate for the petitioner/decree holder submits that as no direction was issued upon the opposite party to make payment of the occupational charges, despite direction of this Hon’ble Court in CO 1192 of 2023, the order impugned ought to be set aside.

The premises in question is premises No. B/168/A/H/1, Tiljala Road. The defendants were directed to hand over vacant and khas possession of the suit property as described in the schedule of the plaint in favour of the petitioner. The decree was put into execution. Such decree was challenged in Ejectment Appeal No. 78 of 2016. The Ejectment Appeal No. 78 of 2016 has since been dismissed.

Zubaida Hamid, the petitioner herein, obtained an eviction decree against Ramlal and others in respect of a separate premises. It is a matter of record that the judgment and decree in the eviction suit was challenged by Rashida as the constituted attorney of Ramlal and others (judgment debtors). During the pendency of the ejectment appeal a stay

was granted in favour of Rashida on the condition that occupational charges of Rs.50,000/- per month should be paid to the decree holder.

The opposite party, one Mr. Sunil Shaw filed an application under Order 21 Rules 98 to 101 of the Code of Civil Procedure before the learned executing court. The said application was registered as Misc. Case No. 81 of 2019. In the said application, the opposite party claimed that he was a tenant under one Rashida Hamid. He was running a leather business from the said premises upon obtaining a trade licence from the Kolkata Municipal Corporation and electricity connection from the CESC authorities. Rashida was the owner in respect of premises No.168A Tiljala Road and the decree was being wrongfully sought to be executed in respect of the said premises.

The opposite party prayed for stay of the execution case, during the pendency of Misc. Case No. 81 of 2019 by filing an application under Section 151 of the Code of Civil Procedure. While deciding the application for stay, the learned executing court in the order dated September 22, 2022 observed that Sunil Shaw claimed to be a tenant under Rashida Hamid, the constituted attorney of some of the judgment debtors. He was residing at and also using the decretal premises. Hence, Rs.50,000/- per month

should be paid as occupational charges. Sunil Shaw had the obligation to pay the occupational charges, being in occupation of the premises in respect of which a decree of eviction was passed.

The learned executing court recorded that Ramlal handed over the tenancy to Rashida and Rashida accordingly inducted Sunil Shaw. It was thus, directed that the amount of Rs.50,000/- be paid within 15th of every succeeding month till the opposite party continued in possession of the decretal property. The arrear occupational charges from May 28, 2019 was directed to be paid within four months from the date of the order. Such order was passed on September 22, 2022. It was also 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 as directed by the court in the order dated September 22, 2022, the petitioner prayed that the execution may 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, 2023, the

Misc. Case No. 208 of 2017 was allowed. The order for police help was granted.

The opposite party preferred an appeal being Misc. Case No. 30 of 2023. The appeal was admitted by the learned Additional District Judge, 14th Court at Alipore and the operation of the order of execution through police help was stayed by an order dated March 22, 2023, without any condition.

Such order was under challenge before this court in C.O. 1192 of 2023, on the ground that without payment of the occupational charges, the execution could not be stayed.

This court, upon hearing the parties and upon considering the factual background and the orders passed in the several proceedings, was of the view that the learned Additional District Judge, 14th Court at Alipore could not have stayed the order of execution through police help, without directing payment as per the order of the learned executing court. The order of the executing court had not been set aside by any superior court. The impugned order dated March 22, 2023, was set aside and this court directed as follows:

“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 above order was challenged by the opposite party, before the Hon'ble Supreme Court by filing a Special Leave Petition. By an order dated July 21, 2023, the Special Leave Petition was dismissed.

Thus, the direction of this court as quoted hereinabove, had attained finality. The Misc. Appeal was directed to be disposed of by this court, within a month. Accordingly the Misc. Appeal was disposed of by the order impugned.

Mr. Chatterjee, learned advocate for the decree holder, submits that the learned lower appellate court, by not directing payment of occupational charges and in allowing the Misc Appeal, sat in appeal over the decision of this court, which was also affirmed by the Hon'ble Supreme Court. The execution of the decree through police help should continue, in view of the failure of Sunil Shaw to pay the occupational charges including arrears as directed by this court in C.O. 1192 of 2023.

This court is of the opinion that the direction of the learned court below that the Misc. Case No. 81 of 2019 and Misc Case No.208 of 2017 should be disposed of within a month, is not erroneous per se. The right of the third party has to be adjudicated by executing court. However, the learned lower appellate court erred in not directing payment of occupational

charges, as decided in C.O. 1192 of 2023. The order passed in Misc Case No.208 of 2017 granting police help was set aside without any condition. This court directed that the Misc Appeal No.30 of 2023 should be disposed of on other points and not on the issue of payment of occupational charges for the purpose of stay of execution. Such issue was finally decided by this Court. Execution would remain stayed subject to payment, was the clear and unequivocal verdict of this court. Hence, setting aside the order dated January 18, 2023 and directing the learned executing court to decide both the Misc cases analogously within a month, amounts to stay of the execution.

Hence, the learned lower appellate court, by remaining silent with regard to payment of occupational charges as directed by the High Court and affirmed by the Hon'ble Supreme Court, while setting aside the order allowing the application under Order 21 Rule 97 of the Code of Civil Procedure, proceeded with material irregularity.

The order impugned is set aside. Sunil Shaw would be bound to comply with the order dated June 5, 2023 passed in C.O. 1192 of 2023. However, the payment schedule is required to be re-arranged. The order dated January 18, 2023 passed in Misc. Case No. 208 of 2017, will remain inoperative till Misc.

Case No. 81 of 2019 is disposed of in accordance with law, preferably within four months from the date of communication of this order. Current occupational charges at the rate of Rs.50,000/- from August 2023 shall be paid within September 15, 2023 and thereafter month by month within 15th of every succeeding month shall be paid by demand draft in favour of the petitioner/decree holder. The arrears from May 28, 2019 till July 2023, shall be paid in four equal monthly instalments. First of such instalment shall be paid with the current occupational charges for August 2023 within September 15, 2023. Fraction if any shall be added to the last instalment. On the outcome of Misc. Case No. 81 of 2019, the fate of Misc. Case No.208 of 2017 will be decided.

In case of default in payment of occupational charges as directed hereinabove, execution through police help, shall be allowed.

The revisional application is accordingly disposed of.

There shall be no order as to costs.

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

(Shampa Sarkar, J.)