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28.02.
2023
Ct. No.652

C. O. 2304 of 2021

Sri Kanchan Roy
Vs
Sri Goutam Gorai & Ors.

Mrs. Shohini Chakraborty
Miss Prajaaini Das
.....For the Petitioner
Mr. D. Raha
Mr. Kuntal Banerjee
.....For the O. P. Nos. 1 and 2

Being aggrieved by and/or dissatisfied with the impugned order dated November 16, 2021 passed by the learned Additional District Judge, 1st Court at Durgapur in Misc. Appeal No.06 of 2021 present application under Article 227 of the Constitution of India has been preferred.

Petitioner's contention is that Opposite party nos. 1 and 2 herein as pre-emptors filed a pre-emption case under Section 8 (1) of the West Bengal Land Reforms Act, 1955 on the ground of co-sharership and also on the ground of contiguous land ownership. Initially the petitioner appeared in the said proceeding and filed written objection, but thereafter petitioner could not appear due to illness and the pre-emption case no. 17 of 2015 was disposed of ex parte against the petitioner. When the baliff visited the suit properly, the petitioner came to know about ex parte order and preferred aforesaid

appeal against said ex parte order along with an application under Section 5 of the Limitation Act for condonation of delay. As the opposite party nos. 1 and 2 have put the ex parte order of pre-emption to execution, the petitioner also filed an application under Order XLI Rule 5 of the Code of Civil Procedure for stay of execution proceeding, till the disposal of the said appeal. Thereafter on November 16, 2021 the said application under Order XLI Rule 5 of the Code of Civil Procedure came up for hearing, when the learned Additional District Judge, 1st Court at Durgapur by the impugned order was pleased to reject the said application.

Mrs. Shohini Chakraborty, learned advocate appearing on behalf of the petitioner relying upon a judgement passed by a Co-ordinate Bench of this court reported in **1978 (2) ClJ 462 (Ram Ch. Sinha V. Sm. Prativa Dutta)** submits that learned court below committed gross miscarriage of justice in rejecting the application under Order XLI Rule 5 without considering that the petitioner had pleaded sufficient cause for delay in preferring the appeal and he committed a flagrant violation of law and procedure in rejecting the application under Order XLI Rule 5 of the Code of Civil Procedure without considering that the petitioner should be given a fair chance to contest the said proceeding. In fact,

learned court below has rejected the application mechanically without considering the urgency involved in the matter. Learned court below has acted illegally upon misconception of law that the said court does not have power to stay operation of execution of ex parte order while dealing with the application under Section 5 of the Limitation Act, which is de hors the settled principle of law.

Mr. Raha, learned advocate appearing on behalf of the opposite party nos. 1 and 2 submits that in view of the specific provisions laid down under Order 41 Rule 3A of the Code of Civil Procedure, learned court below was justified in rejecting the said prayer made by the petitioner and the said order impugned does not call for any interference.

Before going to further details let me reproduce Order XLI Rule 3A (3) – *“when an application has been made under Sub-rule 1, the court shall not make an order for the stay of execution of the decree against which the appeal was proposed to be filed so long as the court does not after hearing under Rule 11 decide to hear the appeal.”*

Order XLI, Rule 3A (3) of the Code makes it absolutely clear that until the delay is condoned, there could be no stay of execution of decree against which appeal is proposed to be filed.

Admittedly in the present context the court

has not disposed of the application under Section 5 of the Limitation Act and as such it has not yet decided to hear the appeal and accordingly Sub-Rule (3) of Rule 3A of Order 41 clearly attracts in the present case. The case law cited by the petitioner in **Ram Ch. Sinha v. Sm. Prativa Dutta's** (supra) the court granted stay after condoning the delay in filing the appeal as delay in filing the said appeal was properly explained in that case.

In view of the aforesaid specific Provision of law, I do not find that the court below has committed any error in rejecting appellant/petitioner's prayer for stay of operation of the Execution Proceeding and accordingly the order impugned does not call for any interference.

In view of the above, C. O. 2304 of 2021 is dismissed. However, learned court below is directed to dispose of the pending application under Section 5 of the Limitation Act within a period of six weeks from the date of communication of the order.

(Ajoy Kumar Mukherjee, J.)

