

Ct. 28.11
No. 3 2023
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**Calcutta High Court
In The Circuit Bench at Jalpaiguri
Appellate Side**

C.O. 144 of 2023

**SRI. RANJIT DEB SINGHA
-VERSUS-
B.R. REAL ESTATE PVT. LTD.**

**Mr. Nripen Das, Adv.
Mr. Digendra Nath Sarkar, Adv.
Mr. Debanjan Das, Adv.**

...For the Petitioner.

**Mr. Ajoy Kumar Singhania, Adv.
Ms. Madhurima Roy, Adv.**

....For the Opposite Party.

Affidavit-in-reply filed on behalf of the Opposite party is taken on record.

Being aggrieved by the order being no.49 and order being no.50 both dated 21.09.2023 passed in Execution Case no.3 of 2017 arising out of T.S. no. 91 of 2010 by the learned Civil Judge (Senior Division) at Siliguri in Misc. Case no. 80 of 2017, this application under Article 227 of the Constitution of India has been preferred by the petitioner.

By the impugned order no.49 dated 21.09.2023 the Court below was pleased to reject the petitioner's application under Order XXI Rule 26(1) read with Section 151 of the Code of Civil Procedure and by order no. 50 dated 21.09.2023, the Court below was pleased to dismiss the petitioner's application under Section 47 of Code of Civil Procedure with cost of Rs.2,000/-.

Mr. Nripen Das, learned Counsel appearing on behalf of the petitioner submits that the Court below erred in exercising its jurisdiction and had acted illegally and with material irregularity by rejecting both the

applications, observing when an application under Order IX Rule 13 is pending, an application under Order XXI Rule 26 cannot be entertained and thereby rejected the prayer of stay.

He further submits that learned Court below did not consider that the application under Order IX Rule 13 is in the verge of completion and is going to be disposed of. He also failed to consider the plight of the petitioner/judgment debtor, who has not yet received the summons of the suit and an ex parte decree was passed behind his back. In this context, he relied upon a judgment of Madras High Court in the matter of M. Nazruddin Vs. The Idol of Arulmigu Navaneedha Krishnasami and Durgai Amman Vahaira Temples and Ors.; reported in [1999] 1 MLJ 747.

Mr. Ajoy Kumar Singhania, learned counsel appearing on behalf of the opposite party raised strong objection contending that on perusal of the application under Order XXI Rule 26(1) filed by the petitioner herein; it is palpably clear that the petitioner has sought for stay of the execution proceeding till disposal of the petition filed under section 47 of the Code of Civil Procedure. Since application filed by the petitioner/judgment debtor under section 47 of the code has already been disposed of by the aforesaid impugned order no.50 dated 21.09.2023, the prayer made in the said application has become infructuous and since the Court has disposed of both the applications on the same date, i.e., on 21.09.2023, said order cannot be called as frivolous nor such order is required to be interfered. If the petitioner is being aggrieved by any observation in the said order made by the Court below regarding

service of summons upon the defendant, he ought to have preferred an appeal but he cannot pray for stay of the execution proceeding on that ground in an application filed under section 47 of the Code.

Learned counsel appearing on behalf of the opposite party relied upon judgment of Hon'ble Supreme Court in the case of Pradeep Mehra Vs. Harijivan J. Jethwa [since deceased Thr. Lrs.] and Ors., reported in 2023 SCC OnLine SC 1395 and contended that the scope of Section 47 is microscopic and it can be applicable only matters relating to execution, discharge and satisfaction of the decree passed by the Court below but in the present context the petitioner herein has only challenged the service of summons. In an application under Section 47 he cannot challenge the legality and validity of the decree on that ground as while passing the ex parte decree, court has already dealt with the issue and observed in favour of the plaintiff and, as such, the Court below rightly rejected the said prayers.

On perusal of the order impugned it appears that the learned Court below while rejecting the petitioner's application under Section 47, was pleased to observe that the scope of Section 47 only confined to the execution, discharge and satisfaction of the decree but the petitioner did not raise any such question for determination but simply prays for stay of the instant execution case till disposal of the miscellaneous case filed under Order IX Rule 13 for setting aside the impugned decree. He further held that the petitioner herein has not made out any case that the decree suffers

from any jurisdictional error or it is a nullity or the decree is not executable in law. Accordingly, the Court below held that the question whether summons were duly issued and served or not cannot be reviewed by an executing Court.

From the submissions made by the petitioner it appears that the petitioner herein alleged that the summons of the original suit has not been served upon him. Petitioner wants to impress the Court that the compliance notice sent under Order XXXIX Rule 3(a) and (b) of the Code of Civil Procedure, has only been served upon the defendant and after getting information he instantly made prayer for setting aside the decree. However, it is alleged that the summons of the suit never served upon him and such question he has raised in both of his applications. Application being Misc. case no.80 of 2017 under Section 47 though disposed of by the Court but the Misc. case being no.79 of 2017 under Order IX Rule 13 is still pending for disposal.

Having considered the facts and circumstances of the case, I find that the orders impugned passed by the court below has not resulted in any gross or manifest failure of justice nor has there been any perversity committed by the court while passing the orders impugned. However, since the plea taken in application under Section 47 that the summons have not been served upon defendants and such issue also involved for adjudication in the Misc. case filed under Order IX Rule 13, I find that the present application can be disposed of by making a direction upon the Court below to dispose

of the Misc. case filed under Order IX Rule 13 of the Code of Civil Procedure expeditiously, giving further liberty to the petitioner to file fresh application for stay before the Court below in the said proceeding being Misc. case no.79 of 2017 filed under Order IX Rule 13.

In view of the above, CO 144 of 2023 is hereby disposed of directing the Court below to dispose of the Petitioner's Misc. case filed under Order IX Rule 13 of the Code of Civil Procedure preferably within a period of twelve weeks from the date of communication of this order.

Petitioner herein will be at liberty to pray for stay of the execution proceeding till disposal of the section 5 application seeking condonation of delay in connection with the Misc. case and/or till disposal of the Misc. case filed under Order IX Rule 13 being Misc. case no.79 of 2017 and in the event of filing such stay application by the petitioner herein, the Court below will dispose of such application in accordance with law at the earliest without being influenced by any observation made herein.

Urgent photostat certified copy of this order, if applied for, be supplied to the petitioner, on priority basis on compliance of all usual formalities.

(Ajoy Kumar Mukherjee, J.)