

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble **Justice Prasenjit Biswas**

C.O. No. 408 of 2012

Sri Nripendra Chandra De (Since Deceased) Represneted by Debabrata

Dey & Anr.

-Versus-

Smt. Sulekha Sen & Ors.

For the Petitioners : **Mr. K. K. Lahiri,
Mr. Debaditya Chatopadhyay.**

For the Opposite Party No. 7 : **Mr. Subrata Das.**

Hearing concluded on : **09.02.2024**

Judgment On : **29.02.2024**

Prasenjit Biswas, J:-

1. Feeling aggrieved and dissatisfied with the impugned order dated 26.08.2011 passed by the Learned Judge, 6th Bench, Small Causes Court,

Calcutta in Ejectment Execution Case No. 212 of 2007 arising out of Ejectment Suit No. 1134 of 2002 the petitioner/decreed holder has filed this application under Article 227 of the Constitution of India.

2. The petitioner being the land lord of the suit premises instituted a suit for ejectment against the proforma opposite parties nos. 1 to 6 who were the heirs of the original tenant Biswanath Sen. The Ejectment Suit No. 1134 of 2002 was decreed on contest by the learned Trial Court on 15.02.2007 whereby decree for recovery of khas possession of the case premises was passed in favour of the plaintiff. Challenging the said judgment and decree passed by the learned Trial Court the judgement debtors/proforma opposite parties nos. 1 and 6 (herein) filed an appeal being Title Appeal No. 63 of 2007 before the First Appellate Court. Thereafter, the plaintiff/ decreed holder put the decree into execution by filing Ejectment Execution Case being No. 212 of 2007. In the meantime, proforma opposite parties (herein) vacated the suit premises on their own in or about January, 2008 and as the appellant/judgement debtor did not appear further before the Appellate Court, the said Title Appeal No. 63 of 2007 was finally disposed of by the learned Appellate Court on 28.02.2008 with a note that the present petitioner/plaintiff had already got the peaceful possession of the suit premises.

3. One Mahendra Kumar Jain filed an application in the Ejectment Execution Case No. 212 of 2007 claiming himself as a necessary party in the capacity of a subtenant in the ground floor of the suit premises under Order I

Rule 10(2) of the Code of Civil Procedure. The said application was rejected by the Executing Court by an order dated 05.02.2009. Thereafter, the said Mahendra Kumar Jain filed another application under Order XXI Rules 97, 98, 99, 100, 101 read with Section 151 of the Code of Civil Procedure in the said Ejectment Execution Case instituted by the plaintiff/decreed-holder describing himself as a sub-tenant in the ground floor of the suit premises with a prayer for adjudication of his right, title and interest therein. The said application was treated as Miscellaneous Case being No. 127 of 2008. In the said Misc. Case of 127 of 2008, an application was taken out by the son of the said Mahendra Kumar Jain namely, Sri Satyendra Kumar Jain under Order XXII Rule 3 of the CPC with a prayer for substitution in the application filed under Order XXI Rule 101 filed by his father who expired on 17.01.2010. The said application for substitution was allowed by the Executing Court by passing an order dated 06.04.2001. A direction was given by the Executing Court to file amended application filed under Order 21 Rule 101 of the Civil Procedure Code by May 21, 2001.

4. Opposite Party No. 7 (herein) filed an application under Article 227 of the Constitution of India being C.O. No. 1420 of 2011 challenging the order passed by the Executing Court dated 06.04.2011 in Ejectment Execution Case No. 212 of 2007 whereby date was fixed on 19.05.2011 for delivery of possession in favour of the decree holder in respect of the suit premises and which is prior to the date fixed by the learned Trial Court for filing amended petition in Misc. Case No. 127 of 2008. That C.O was disposed by this court

on 28.07.2011 with giving directions upon the learned Trial Court and the relevant portions of the said order passed by this Court are hereby quoted as follows:

“The applicant is directed to file the amended misc. case within three weeks from date and that the opposite parties may file affidavit-in-opposition, if any, one week thereafter. Reply, if any must be filed within three days thereafter. The Learned Trial Judge shall fix the next date for hearing of the misc. case within seven days from the date of filing of the reply, if any. Thereafter he shall dispose of the said misc. case no. 127 of 2008 by the end of November, 2011. The above dates are firmed and mandatory and the learned Executing Court is directed to observe strict compliance of the same.”

5. It is submitted by the learned Counsel on behalf of the petitioners that the opposite party no. 7 (herein) purportedly filed an application under Section 151 of the Code of Civil Procedure before the Executing Court with a prayer for dismissal of the Ejectment Execution Case No. 212 of 2008 taking the plea that the appeal preferred by one of the judgment debtors was already disposed of with taking note that the respondent/plaintiff/decree-holder had already got the peaceful possession of the suit property. Accordingly, learned Executing Court rejected the application filed by the petitioner Satyendra Kumar Jain upon which Miscellaneous Case being no. 127 of 2008 was started. It is held by the learned Trial Court that learned Advocate on behalf of the decree-holder/respondent submitted in Title Appeal No. 63 of 2007 that

the present petitioner had already got vacant and khas possession of the suit premises and they were in occupation and on the basis of the said submission learned Appellate Court dismissed the appeal instituted by one of the judgment debtors being Title Appeal No. 63 of 2007. As the appeal was dismissed on the ground of getting vacant and khas possession of the suit premises by the decree holder the Misc. Case being No. 127 of 2008 was dismissed by the Court.

6. By passing the impugned order dated 26.08.2011, the executing Court also rejected the Ejectment Execution Case filed by the decree-holder being No. 212 of 2007 with observation that the First Appellate Court has already dismissed/disposed of the appeal with a note that the plaintiff/decreed-holder had already got possession in respect of the suit premises.

7. After getting the decree of ejectment in connection with Ejectment Suit No. 1134 of 2002 the decree-holder/petitioner (herein) put the decree into execution being Ejectment Execution Case No. 212 of 2007. In fact father of the opposite party no. 7 Mahendra Kumar Jain was not a party to the said ejectment suit instituted by the plaintiff. When the decree passed in the ejectment suit was put into execution then Mahendra Kumar Jain filed an application under Order I Rule 10 (2) of CPC with prayer for adding himself as a necessary party in the said execution case which was turned down by the learned Executing Court. Thereafter another application was filed by the said Mahendra Kumar under Order XXI Rule 97, 98, 100 and 101 read with Section 151 of CPC in the said execution case being no. 212 of 2007 and the

said application was registered as Miscellaneous Case being No. 127 of 2008 and after his death a substitution application was filed on behalf of the Satyendra Kumar Jain claiming himself as a sub-tenant in the ground floor of the said suit premises and it was allowed by the learned Trial Court. So, it is clear that the father of the opposite party no. 7 Mahendra Kumar Jain was not a party to the Ejectment Execution Case No. 212 of 2008 filed by the petitioner/plaintiff/decreed-holder but the learned Trial Court dismissed the said application relying upon the submission made by the petitioner in Misc. Case No. 127 of 2008 as well as banking upon the order passed by the Appellate Court in connection with Title Appeal No. 63 of 2007. It is apparent from the materials on record that the appeal was preferred by one of the judgment-debtors/defendants in connection with Ejectment Suit No. 1134 of 2002 and in the said appeal learned Advocate for the respondent submitted that the said judgment debtor/appellant had already delivered vacant and khas possession of the suit premises. It is nowhere in the said order that the decreed-holder got possession of the entire suit premises. Moreover, Appellate Court did not pass any order directing upon the executing Court to dismiss/dispose of the said application in view of order passed by the Appellate Court dated 28.02.2008.

8. It is submitted by the learned Counsel appearing on behalf of the petitioner that the Appellate Court did not indicate that the vacant possession of the entire suit premises was restored back to the decreed-holder in terms of the decree as the decreed-holder submitted that the judgment debtor/appellant

of the said appeal had delivered back possession only the first and second floor of the suit premises which was under the possession of the said appellant/judgment debtor at that time.

9. It further appears that the misc. case no. 127 of 2008 was initiated upon an application made by the father of the opposite party no. 7 (herein) under the provision of Order XXI Rule 97, 98, 99, 100 and 101 of the CPC. It appears that neither opposite party no. 7 nor his father Mahendra Kumar Jain was a party to the Ejectment Suit No. 1134 of 2002 or a party to the Ejectment Execution Case No. 212 of 2007, despite the learned Trial Court rejected the execution case instituted by the present petitioner/decreed-holder. The executing Court failed to understand the actual meaning and purport of the order dated 21.02.2008 passed by the Appellate Court in connection with Title Appeal No. 63 of 2007. So, the Execution Case No. 212 of 2007 should not be dismissed upon a petition filed by a person who is neither a party to the suit nor a party to the ejectment execution case. It is no doubt that the execution case filed by the decree-holder will be proceeded on its own way and it should not be dismissed or disposed of on an application by a person who is not connected in any way to the suit or the execution proceeding. The application filed by the opposite party no. 7 was a proceeding under the provision of Order XXI Rule 97, 98 99, 100 and 101 of CPC and it should be decided upon the grounds taken by that petitioner. The said execution case being no. 212 of 2007 was disposed of on the finding of the appellate Court and the said appeal was instituted by one of the judgment debtors which was

subsequently, compromised and delivered possession in favour of the decree-holder.

10. So, I am of the view the impugned order did not adjudicate any question regarding recovery of vacant possession by the decree-holder in respect of the whole of the suit premises, which factum is to be seen, examined and executed by the Executing Court.

11. Learned Executing Court was erred in law in ignoring the fact that the Misc. Case No. 127 of 2008 was filed by the predecessor in interest of the opposite party no.7 in order to establish his right in respect of the ground floor of the suit premises in the capacity of a sub tenant under the judgement debtors and his application with prayer for adding himself as a party in the Ejectment Execution Case No. 212 of 2007 was rejected. So, the execution case should not have been dismissed upon the petition who is virtually an outsider to the execution case and whose rights and interests had not been adjudicated in respect of the case premises.

12. The executing court should be proceeded with for recovery of possession of the whole of the decreetal property and should not have been dismissed without ensuring the same since there is nothing in the record that the decree holder got vacant possession of the whole of the suit property. It is to be kept in mind that execution of a decree can be termed as the most important aspect of the civil justice system. It is the last stage of any civil litigation. The success or failure of the civil justice system depends on the success in executing the decree passed by the civil court. Executing Court was duty

bound to issue warrant of possession for effecting physical delivery of the suit land. I hold that the Executing Court committed error in passing the impugned order without following the legal provisions as enshrined in the Act. Accordingly, I find there is illegality and material irregularity in the impugned order dated 26.08.2011 passed by the learned Trial Court.

13. Accordingly, the impugned order dated 26.08.2011 passed by the Learned Judge, 6th Bench, Small Causes Court, Calcutta in Ejectment Execution Case No. 212 of 2007 is hereby set aside.

14. C.O. being No. 408 of 2012 is hereby allowed but without any order as to costs.

15. Learned Trial Court is hereby directed to dispose of the execution case being Ejectment Execution Case No. 212 of 2007 as expeditiously as possible preferably within 6 months from the communication of this order.

16. It is brought to the notice of this Court that in the order dated 09.02.2024 inadvertently case no. is written as “C.O. 408 of 2012 In IA.: CAN 2/2024” in place of “C.O. No. 408 of 2012”. This mistake is apparent. Department is directed to make necessary correction in this regard.

17. Urgent photostat certified copy of this order, if applied for be given to the parties on payment of requisite fees.

(Prasenjit Biswas, J.)