

29.01.2024
Sl. No.7(DL)
srm

C.O. No. 755 of 2023

Smt. Pratima Paul

Versus

Smt. Alpana Kundu & Ors.

Mr. Partha Pratim Ray,
Mr. Dyutiman Banerjee,
Mr. Debayan Roy

...for the Petitioner.

Mr. Sandip Ghosh,
Ms. Mousumi Chatterjee

...for the Opposite Party Nos.1 to 3.

This revisional application arises out of an order dated January 3, 2023 passed by the learned Civil Judge (Junior Division), 5th Court at Howrah in Misc. Case No.210 of 2016. The Misc. Case was filed in connection with Title Execution Case No.08 of 2007.

The opposite party Nos.1, 2 and 3 are decree-holders. They put the decree into execution. The eviction suit was decreed against the opposite party Nos.4 to 7/judgment debtors. The petitioner, an executor of the last will and testament of one Mahadev Kundu had filed an objection in the execution proceeding under Order XXI Rules 99 to 101 of the Code of Civil Procedure. An application for stay of the execution was filed with a nomenclature that the said

application was under Section 10 of the Code of Civil Procedure. The learned court below was of the view that the provision of Section 10 of the Code of Civil Procedure would not apply as the cause of action in the probate suit and in the eviction suit were different.

The petitioner contended that till the probate suit was not disposed of and the genuineness of the will was not decided, the beneficiaries who were in occupation, should not be evicted on the basis of the eviction decree passed against the opposite party Nos.4 to 7.

Mr. Ray, learned Advocate appearing on behalf of the petitioner submits that the executor has the right to protect the property of the testator and also to see that the will of the testator is acted upon, once the probate is granted. The executor is the custodian of the property and is to distribute the property among the beneficiaries. Hence, the execution should be stayed till the probate is granted. The suit is between the stepbrothers and it is for the ends of justice that the probate suit should be disposed of first, before the eviction decree is executed. The petitioner, as the executor, was only trying to protect the rights of the beneficiaries under the said will.

Mr. Ghosh, learned Advocate appearing on behalf of the decree-holders submits that the cause of action in the probate

suit is completely different from the eviction suit and the execution of the eviction decree cannot be put on hold only because a probate suit is pending. Moreover, grant of probate does not amount to declaration of title.

Having considered the rival contentions of the parties, this Court is of the view that the learned court below ought to have allowed the application for stay of the execution on condition, even if the same was filed under Section 10 of the Code of Civil Procedure. The learned court ought to have appreciated that the issues which have been raised by Mr. Ray with regard to the probate proceeding, the right of the executor under a will and the right of beneficiaries, were matters to be decided in the application under Order XXI Rules 99 to 101 of the Code of Civil Procedure, i.e., in the Misc. Case No.210 of 2016. However, till the misc. case is disposed of, there should be a stay of the execution proceedings, otherwise the misc. case will become infructuous and will cause unnecessary complication. It is in the misc. case that the learned court will decide the issues raised by Mr. Ray. The right of the executor, the duty of the executor and the pendency of the probate suit are issues connected with the merits of the application under Order XXI Rules 99 to 101 of the Code of Civil Procedure.

Till the disposal of Misc. Case No.210 of 2016, Title Execution Case No.08 of 2007 shall remain stayed upon the petitioner depositing in court a onetime amount as occupational charges of Rs.50,000/-. Such quantum is decided upon taking note of the area in which the property is situated, the nature of property in occupation of the petitioner through the beneficiaries under the will and the nature of construction. The sum of Rs.50,000/- shall be deposited within three weeks from date.

Needless to mention, the misc. case should be disposed of within a period of three months from the date of communication of this order.

Accordingly, the revisional application is disposed of.

There shall be no order as to costs.

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

(Shampa Sarkar, J.)