

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

C.O. 926 of 2024

Taherbhai
Vs.
M. Emdadul Haque and others

For the petitioner : Mr. Aniruddha Chatterjee
Mr. Daanish Haque
Mr. Zeeshan Haque
Mr. Younus Sultan

For the opposite parties : Mr. Tarak Nath Halder

Hearing concluded on: 19.03.2024

Judgment on: 19.04.2024

Shampa Sarkar, J.:-

1. The revisional application arises out of an order dated February 17, 2024, passed by the learned Additional District Judge 2nd Court, Sealdah, District- South 24 Praganas, in Misc. Appeal No. 4 of 2024.

2. The Misc. appeal was filed by the petitioner, being aggrieved by an order dated January 4, 2024 passed by the Learned Civil Judge, Junior Division, 2nd Court at Sealdah in Misc. Case No. 25 of 2010. Misc. case No. 25 of 2010 was an application under Order 21 Rule 97 of the Code of Civil Procedure. The learned executing court allowed execution of the decree through police help.

3. By the order impugned, the learned appellate court rejected an application for stay, filed in connection with the Misc. appeal. The

application for stay was filed by the petitioner/judgment debtor/appellant, for stay of the proceedings in Title Execution Case No.42 of 2004, till disposal of the miscellaneous appeal.

4. The points taken in the stay application were that, the decree passed in Title Suit No. 393 of 1984 dated April 30 2024 suffered from lack of jurisdiction and was a nullity. The executability of the decree had already been questioned in the executing court. The decree on the ground of default was erroneous as the challans could not be produced at the relevant time. The same were filed in the execution case. The decree was passed ex parte as the learned Advocate for the petitioner was absent. The PW1 and PW2 could not be cross-examined. The judgment-debtor failed to adduce evidence. The Misc. Case No.47 of 2004 praying for setting aside the ex parte decree was dismissed as not maintainable. A title appeal was filed which was also dismissed by upholding the decree of eviction on the ground of default. If the records were consulted, it would be clear that rent had been paid and the challans were available.

5. All such objections had been raised in the application under Section 47 of the Code of Civil Procedure, which was registered as Misc. Case No.70 of 2008. The challans were also produced in Misc. Case No. 70 of 2008. Unless the execution proceeding was stayed, the Misc. Appeal would be rendered infructuous, and the petitioner would suffer irreparable loss and injury. It was further contended that the writ of possession was not sought to be executed in the normal way. The bailiff's report was manufactured.

6. Mr. Aniruddha Chatterjee, learned advocate for the petitioner submitted that the learned appellate court ought to have appreciated the

cardinal principle of law that during pendency of an appeal, the proceeding from which the appeal arose ought to be stayed, otherwise the situation would become irreversible and would also preclude a fair as just decision in the appeal. Mr. Chatterjee further submitted that the application under Section 47 of the Code of Civil Procedure was also pending before the learned execution court, being Misc. Case No. 70 of 2008. All the objections with regard to the executability of the decree had been taken in the said Misc. Case. The judgment-debtor had already raised the question with regard to discharge, execution and satisfaction of the decree. According to the judgment debtor, the decree was not executable as it was a nullity. The ground of default was wrongly held to be proved by both the courts. The rent deposit challans were filed in the Misc. Case No.70 of 2008. They would indicate that the suit was decreed on erroneous appreciation of evidence.

7. It was further contented by Mr. Chatterjee, that the earlier orders of dismissal of stay applications by the executing court would not be a deterrent for the learned appellate court to grant a stay of the execution proceedings, till disposal of the appeal. Mr. Chatterjee submitted that the appeal may be directed to be disposed of within a short while and stay of the execution proceeding till the disposal of the appeal, may be granted by this court.

8. Mr. Halder, learned Advocate for the decree-holders/opposite parties submitted that the suit was decreed on April 30, 2004, upon holding that the petitioner had sublet the tenanted premises and had also defaulted in payment of rent from November 1993 to April 2004. Thereafter, the decree was put into execution sometime in July, 2004, and Title Execution Case

No. 42 of 2004 was registered in the Court of the Learned Civil Judge, (Junior Division) at Sealdah. An application under Order 9 Rule 13 was filed for setting aside the decree being Misc. Case No. 47 of 2004. The same was dismissed as not maintainable. Assailing the judgment and decree, the petitioner preferred an appeal before the learned Civil Judge, (Senior Division), at Sealdah, which was registered as Title Appeal No. 70 of 2004 and thereafter renumbered as Title Appeal No. 20 of 2005. By judgment and decree dated, January 21, 2008, the learned appellate court partially affirmed the decree passed in the title suit, inter alia, holding that the petitioner had committed default in payment of rent from June 1993 till the date of the judgment and decree passed by the learned trial Judge. The ground of subletting was not accepted by the learned first appellate court. The decree attained finality as the petitioners did not prefer any second appeal before the High Court.

9. Again, another application under Section 47 of the Code of civil procedure was filed questioning the execution, satisfaction and discharge of the decree, inter alia, on the ground that there was no default in payment of rent, as the petitioner was depositing the rent in the office of the Rent Controller. Further ground was that the heirs and legal representatives of the original plaintiff had not been substituted. The same was registered as Misc. Case No. 70 of 2008, which was pending adjudication. A prayer for stay of all further proceedings in the Title Execution Case till disposal of the Misc. Appeal was made. The application was rejected by order dated May 7, 2010. The order remained unchallenged. The learned executing court was of the view that as no order of stay of the execution proceedings had been

passed by any superior forum, the court was competent to continue with the execution proceeding and also the Misc. Case.

10. The said order of rejection was not challenged by the petitioner. The petitioner accepted the order by which the learned executing court was of the view that the execution proceedings should not be stayed, but should continue. Next, it was submitted, that in 2010, the bailiff was restrained from delivering possession of the property and the decree-holders filed an application under Order 21 Rule 97 of the Code of Civil Procedure for police help. The said application was registered as the Misc. case No. 25 of 2010.

11. Again, an application for stay of further proceedings in Title Execution Case No. 42 of 2004, till disposal of Misc. Case No.70 of 2008 was filed as Misc. Case No.25 of 2010.

12. By order dated October 7, 2003, the said application for stay was once again rejected. The learned court held that after the dismissal of the title appeal, the application for stay was liable to be rejected. As the judgment-debtor was unsuccessful in the appeal, the learned executing court was not inclined to stay further proceedings in the execution case. Instead, an order was passed for early disposal of Misc. Case No.25 of 2010. Thereafter, the said application being Misc. Case No.25 of 2010 was considered by the learned court and was allowed on contest by order dated January 4, 2024. Evidence was allowed to be led by the parties. The Misc. Appeal 04 of 2024 was preferred by the petitioner. The appellate court rejected the application for stay of the execution proceedings on cogent grounds.

13. According to Mr. Halder, when two earlier applications for stay of the execution proceeding has been rejected by the Learned Court and no

challenge to the same had been preferred by the petitioner, further prayer for stay of the execution proceeding, was barred by the principles of res judicata. Again, a further prayer for stay of execution proceedings could not be entertained by the learned appellate court.

14. Considered the submissions of the parties and perused the records. While disposing of Misc. Case No. 25 of 2010, the learned executing court observed that the Misc. Case had been filed on June 3, 2010. The learned Advocate had filed uncountable number of adjournment petitions in the Misc. Case, just to drag the proceedings. On November 20 2011, the affidavit-in-chief of PW1 was filed by the original decree holder, and on August 7, 2012, the power of attorney holder filed one examination in chief. The power of attorney holder was examined and cross examined in court as PW1. The documents were marked as Exhibit-1 and 2/1. On January 21, 2023, the seal bailiff was fully examined as PW 2. The report and signature of the bailiff were marked as Exhibit No. 3 and 4. On the other hand, no evidence had been adduced by the judgment debtor/petitioner. The bailiff report was perused by the learned court and the court found that at the time of execution of writ of possession by the court bailiff, the men and agents of the judgment debtor vehemently resisted the bailiff. The court held that possession of the suit property could not be delivered to the decree holders due to such resistance and obstruction by some anti-social elements who had appeared on the spot. There was apprehension of breach of peace and the bailiff could not execute the writ.

15. The learned Court considered such facts and noted the attitude of the judgment-debtor. Moreover, the judgment-debtor declined to adduce

evidence. The learned court was of the view that without police help the delivery of possession could not be executed by the seal bailiff. The decree holder was directed to deposit police cost by January 19, 2024. Such order was challenged before the learned appellate court in Misc. appeal No. 4 of 2024. In the Misc. Appeal, the petitioner again prayed for stay of the execution proceedings. It is significant to note that two earlier applications for stay of the execution had already been rejected by the learned executing court and the petitioner did not challenge the same.

16. The learned appellate court took up the application for stay of the execution on February 17, 2024. It was urged before the learned appellate court that the bailiff report had been manufactured and no attempt had been made for execution the decree in the ordinary way. Thus, without any obstruction, the application under Order 21 Rule 97 of the CPC was not maintainable and the same was erroneously allowed by the learned trial Judge. It was further urged that without deciding the application under Section 47 of the Code of Civil Procedure, the Misc. Case No.25 of 2010 should not have been allowed. Similar grounds as raised in the application for stay filed in the Misc. Appeal were raised in earlier proceedings seeking stay of the execution and stay of the Misc. case No.25 of 2010, till disposal of the Misc. Case 70 of 2008. Such prayers had been turned down.

17. The decree-holders, however, urged that since 2004, several hurdles had been faced in executing the decree of eviction. Only intention of the judgment-debtor was to deny the decree-holders the fruits of the decree. The execution was filed in 2004 and 20 years had passed but the decree could not be executed. Upon perusal of the bailiff report, the learned executing

court found the conduct of the judgment-debtor to be improper. The Misc. Case was allowed upon examining the seal bailiff and the report was duly marked. No evidence, either contrary to the afore-mentioned report or in rebuttal to the evidence of PW1 and the Bailiff (PW2), had been led by the petitioner/judgment debtor. Thereafter, the learned court allowed the Misc. Case. It was also held that the decree of eviction on the ground of default had been upheld by the appellate court and the pendency of the Misc. Case No.70 of 2008 should not stand in the way of complete justice. Thus, the prayer for stay was rightly refused by the appellate court. It was further observed that if the petitioner was successful in the appeal, the petitioner could always take resort to Section 144 of the Code, for restoration of his possession. This court also finds that the executing court had rejected the prayer for stay of execution on two earlier occasions.

18. The Hon'ble Apex Court had time and again deprecated the practice of prolonging the execution proceedings. The conduct of the judgment-debtor in prolonging the execution of a decree by taking resort to the provisions of the Code of Civil Procedure was considered by the appellate court and the executing court. Accordingly stay was refused in the appeal. Procedural law should be used for the benefit of the decree holder and should not be used to deny the decree-holder the fruits of the decree.

19. Reference is made to the decisions of ***Bhoj Raj Garg vs. Goyal Education and Welfare Society & Ors.*** decided in ***Special Leave Appeal No.19654 of 2022***. The Hon'ble Apex Court held as follow:-

“The complaint of the petitioner is that the Execution Court is not abiding by the directions issued by this Court in the decision in

Rahul S. Shah Vs. Jinendra Kumar Gandhi & Ors., reported in (2021) 6 SCC 418. In the said decision, it was held as follows:-

‘42. All Courts dealing with suits and execution proceedings shall mandatorily follow the below mentioned directions:-

2. The Executing Court must dispose of the Execution Proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay.’

This means that it becomes the duty of the Execution Court to dispose of the execution proceedings at the earliest and since this Court has directed that the Execution Court must dispose of the execution proceedings within six months from the date of filing, which can be extended only by recording reasons in writing for such delay, this direction is meant to be observed. This would mean that every effort should be made to dispose of the execution petition within the said time limit and the Execution Court should have reasons for not being able to dispose of the execution petition. The Execution Court is duty bound to record reasons in writing when it is unable to dispose of the matter.”

20. In ***Rahul S. Shah (supra)***, it had been categorically held that execution cases should be completed expeditiously. The Hon’ble Apex Court noted the sorry state of affairs and how the provisions of law were being misused to delay execution proceedings.

21. The learned appellate court also took note of the events and the orders passed in the proceedings and arrived at the conclusion that the question of staying the execution proceeding would not arise. Moreover, the court held that the provision of Section 144 of the Code of Civil Procedure could be availed of, if the petitioner was successful before the learned appellate court and possession could be restored.

22. The learned appellate court has exercised jurisdiction and come to the specific finding that the circumstances of the case and the situation in which Misc. Case 25 of 2010 was allowed, did not warrant stay of the execution. The learned appellate court specifically took note of the fact that

while the decree-holder and the seal-bailiff had adduced evidence in the Misc. case No. 25 of 2010 and the report of the seal bailiff and his signature has been marked as exhibits, the petitioner did not lead any evidence to contradict the deposition, either of the decree holder or the bailiff.

23. Thus, the learned appellate court did not find any reason to stay the proceedings. The relevant portion of the order impugned is quoted below:-

“Perused the impugned order along with the report of the bailiff. The impugned order speaks clearly of the conduct of the present appellant/JDR during the course of the misc. case. It further appears that impugned order was passed after examination of the seal bailiff and the report was duly marked. It also appears that no contra evidence was laid from the side of the JDR during the hearing of the misc. case for which the decisions relied upon by the appellant do not readily come to his aid for the purpose of considering the stay application.”

24. The revisional application is dismissed as this court does not find any perversity in the order. The learned appellate court has provided the reason for denying the prayer for stay of the execution on the available records and the admitted facts. The order is well reasoned and not based on surmise and conjecture. The evidence has been considered.

25. The court also recorded that the report of the seal bailiff clearly indicated that he was obstructed and he could not execute the delivery of possession. On these findings, the stay application was rejected.

26. The propriety of order allowing the Misc. case No. 25 of 2010 during pendency of the Misc. case No. 70 of 2008 and the maintainability of Misc. case No. 25 or 2010, are relevant questions for adjudication of Misc. Appeal No. 4 of 2024.

27. The learned appellate court will proceed in accordance with law, without being influenced by this order. The observations herein are tentative and are relevant for the purpose of disposal of this revisional application.

28. The revisional application is accordingly disposed of.

29. However, there shall be no order as to costs.

30. Parties are to act on the basis of the server copy of this judgment.

(Shampa Sarkar, J.)