

23.04.2024
Court No. 19
Item no.03
CP

C.O. No. 2727 of 2023

Manik Mondal & ors.
vs.
Mahiruddin Mondal & ors.

Mr. Gopal Chandra Ghosh

... for the petitioners.

1. None appears on behalf of the opposite parties, despite service. Two affidavits of service, indicating that the opposite parties have been served with a copy of the revisional application, have been filed in court.
2. This court finds that the learned Civil Judge (Junior Division), Bongaon passed an order on July 28, 2023 in Title Execution Case No. 13 of 2016 granting stay of the execution, inter alia, holding that as the High Court had observed that stay should be granted in respect of the execution case and an opportunity should be given to the judgment debtor to approach the learned appellate court, the prayer for stay was justified.
3. This court is of the view that the application for stay should have been disposed of on merits. The executing court proceeded as if this court had directed the executing court to grant the

stay. The order deserves to be set aside on the ground that the learned court misconstrued the order of this court.

4. First and foremost, the Civil Revision, namely, C.O. 2274 of 2023 had been disposed of by this court by order dated July 25, 2023, inter alia, directing the judgment debtor to approach the court before which the Title Appeal was pending with his prayer for stay of the execution case. This court was given an impression that the Title Appeal which had been dismissed for default, was subsequently restored.
5. C.O. 2274 of 2023 was filed challenging an order dated May 20, 2023, passed in Title Execution Case No. 13 of 2016. The learned Civil Judge (Junior Division), Bongaon had refused to grant stay of the execution. A Misc. Appeal was preferred which was also dismissed. Hence, the revisional application was filed. The lower appellate court while hearing the said Misc. Appeal arrived at a conclusion that the Title Appeal No. 10 of 2016, which was filed by the opposite party, was not in existence. The appeal was dismissed for default on November 17, 2022. The application for restoration of the appeal had

not been decided. The order for delivery of possession with police help was already passed and it would not be proper to pass orders by recalling the writ.

6. This court observed that, as the learned advocate for the opposite party had submitted that the Title Appeal had been restored, the prayer for stay of the execution as also stay of the writ of delivery, should be made before the learned appellate court. Accordingly, the revisional application was disposed of. Again, the opposite party filed an application for stay before the learned executing court, instead of approaching the learned appellate court.
7. It is submitted by Mr. Ghosh, learned advocate for the petitioners, upon instructions, that the Title Appeal had not been restored and the court was misled. The correctness of such contention of Mr. Ghosh cannot be ascertained. The opposite parties have chosen not to appear before this court to contest the matter. No doubt, the opposite parties are entitled to get the appeal restored, but instead of getting the appeal restored and praying for a stay of the execution before the appellate court the opposite parties once again approached the learned executing court with a similar prayer

which had earlier been refused and which was not interfered with by this court in the earlier revisional application.

8. The executing court should have enquired whether there was an appeal pending and thereafter decided the stay application on its own merits, instead of granting an unconditional stay of the execution. This is an eviction suit and stay of the execution cannot be without any terms and conditions.
9. The order impugned is set aside.
10. The learned executing court is directed to hear the application for stay on merits upon contest, and first ascertain whether the earlier order of this court had been complied with by the judgment debtor by approaching the court of appeal. The application for stay will be disposed of within June 24, 2024, in accordance with law. All points raised by Mr. Ghosh, including the question of res judicata will be decided in the stay application.
11. The stay application has to be decided prior to any other steps that may be taken in the execution case.
12. The revisional application is accordingly disposed of. There shall be no order as to costs.

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

(Shampa Sarkar, J.)