

D/L - 3
03.01.2025
Court. No. 5
S.Kundu

C.O. 2505 of 2024

Sadhan Chandra Das
Vs.
Prabir Kumar Banik & Ors.

Mr. Swapan Kumar Mallick

...for the petitioner.

Mr. Sounak Bhattacharyya,
Mr. Sounak Mandal,
Mr. Anirban Saha Roy

...for the Opposite party.

1. Challenging an order dated 18th May, 2024 in connection with Misc. Case No. 135 of 2022 arising out of Title Suit No. 90 of 2016 passed by the learned 5th Civil Judge (Senior Division), at Alipore whereby the execution case being no. 02 of 2022 has been stayed till disposal of the miscellaneous case, the instant revisional application has been filed.
2. To appreciate the challenge it is necessary to note down the facts. The petitioner had instituted a Title Suit being no. 90 of 2016 before the Court of the learned 5th Civil Judge (Senior Division), at Alipore, *inter alia*, praying for decree for recovery of khas possession of the suit property by evicting defendant therefrom.
3. Records would reveal that an *ex parte* decree was passed on 26th September, 2019. It is the case of the opposite party that upon the plaintiff's muscle man attempting to forcefully evict the opposite party from

the suit property on 15th June, 2022 and upon disclosure that they have obtained eviction order from the learned Court that the opposite party made enquiries from his advocate and ultimately was able to obtain the certified copy of the plaint and order sheet of the suit on 4th July, 2022. It appears that thereafter, an application under Order 9 Rule 13 of the Code of Civil Procedure 1908 (hereinafter referred to as the Code) was filed accompanied by an application under Section 5 of the Limitation Act, 1963. On the opposite party's own showing that there was a delay of four days in filing the miscellaneous case being Miscellaneous Case No. 135 of 2022. Records would reveal that the opposite party upon ascertaining that a Title Execution case no. 02 of 2022 having been filed by the petitioner, filed an application praying for stay of all further proceedings in the execution case being Title Execution Case No. 02 of 2022. Such application was filed on 23rd August, 2022. It is in connection therewith that the order dated 18th May, 2024 has been passed.

4. The petitioner is primarily aggrieved by the fact that the learned Judge without condoning the delay in filing the application under Order 9 Rule 13 of the Code had stayed the execution case. According to the petitioner this is an irregularity in procedure committed by the learned Judge. Mr. Mallick, learned advocate appearing in support of the aforesaid application would

submit that ordinarily when an application under Order 9 Rule 13 of the Code is filed till such time the Court condones the delay in filing such application no order should be passed staying the execution of the decree.

5. In the facts noted hereinabove, he submits that the order impugned should be set aside and the matter should be remanded back for fresh adjudication by the trial Court.
6. Mr. Bhattacharyya, learned advocate representing the opposite party on the other hand, would submit that the opposite party was not aware with regard to the factum of passing of the decree or with regard to the filing of the suit until the time mentioned herein. It is only when the muscle men of the petitioner attempted to evict the opposite party from the suit property that the opposite party upon making enquiry and upon ascertain that not only the suit has been filed but the decree has been passed thereon behind the back of the opposite party, filed an application under Order 9 Rule 13 of the Code. Since, pending disposal of such application the petitioner was proceeding with execution of the decree, the opposite party was compelled to file an application for stay of the execution. He would submit that there is no irregularity on the part of the learned Judge in staying the execution proceeding. In absence of such stay, the application under Order 9 Rule 13 of the Code is likely to be rendered infructuous.

7. Having heard the learned advocates appearing for the respective parties, it may be noted that admittedly in this case, an *ex parte* decree has been passed. It also appears that the opposite party has filed an application under Order 9 Rule 13 of the Code on the ground of non-service of summons. Admittedly, the petitioner has put the *ex parte* decree in execution which prompted the opposite party to file an application for stay. The learned Court taking note of the pendency of the application under Order 9 Rule 13 and to avoid multiplicity of judicial proceedings and further noting that the opposite party is still in possession of the suit property, had passed an order of conditional stay. It appears that the learned Court has directed the opposite party to make payment of occupational charges @ Rs.2000/- per month till disposal of the case. It is true that the application under Section 5 of the Limitation Act, 1963 filed by the petitioner is yet to be disposed of, however, in the fitness of things, if the *ex parte* decree is permitted to be executed pending disposal of the application under Section 5 of the Limitation Act and the application under Order 9 Rule 13 of the Code, then the whole object of moving the application under Order 9 Rule 13 of the Code would be rendered infructuous. The learned Judge has rightly adopted a justice oriented approach.

8. Having regard thereto, I am of the view that the learned Judge did not commit any irregularity in procedure in staying the execution conditionally. At this stage, however, Mr. Mallick would submit that the determination made on account of the occupational charge was not based on cogent evidence and as such liberty should be granted to the petitioner to apply before the learned Court for variation of the order in so far as the determination of the occupational charge is concerned.
9. Having regard to such submissions and upon hearing of Mr. Bhattacharya, I am of the view that if the petitioner files an appropriate application before the learned Court for variation of the determination of the occupational charge, the learned Court shall hear out the same in accordance with law. It is made clear that the aforesaid stay of the execution shall continue provided the opposite party complies with direction for payment of occupational charge already directed by the Court vide order dated 18th May, 2024 and subject to any variation that may be allowed by the learned Court and further subject to the outcome of the application under Order IX Rule 13 of the Code.
10. With the above observations and directions, the revisional application stands disposed of.
11. There shall be no order as to costs.

12. It is made clear that this Court has not gone into the merits of the application under Order 9 Rule 13 of the Code and it shall be open to the learned Court to decide the same on merits.
13. Urgent Photostat certified copy of this order, if applied for, be given to the parties upon compliance with necessary formalities.

(Raja Basu Chowdhury, J.)