

IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

Present:-

HON'BLE JUSTICE CHAITALI CHATTERJEE DAS

CO 3720 OF 2024

SASADHAR BERA AND ANR.

VS

BIBEKANANDA SAMANTA

For the Petitioner : Mr. Dipanjan Datta, Adv.
Mr. Sukanya Datta, Adv.
Mr. Sayan Datta, Adv.
Mr. Subhajit Chowdhury, Adv.

For the Opposite Parties: Mr. T.K. Bhattacharya, Adv.
Mr. Ashis Kumar Paul, Adv.

Last Heard on : 17.06.2025

Judgement on : 25.06.2025

CHAITALI CHATTERJEE DAS, J:-

1. This revisional application is directed against an order dated 06.09. 2024 passed by the Learned Civil Judge, Junior Division, Second Court, Uluberia, Howrah in Misc. case number 12 of 2017 arising out of Title Execution case No. 9 of 2013 where the Misc. case no. 12 of 27 has been restored with cost of ₹21,000.
2. The fact of the Case in a nutshell is that the plaintiff being the petitioners obtained an expert decree against the opposite party in title suit number

119 of 2006, on January 13, 2012 from the Court of Civil Judge, Junior Division, Second Court, Uluberia, Howrah. After that the said decree was put to execution and accordingly the Title Execution case no. 9/13 as filed. The Opposite Party being the judgement debtor filed an application under Section 47 of the Code of Civil Procedure in the said execution case which was subsequently registered as Misc. Case no. 12 of 2017.

3. On December 18, 2019, the said Misc. case was dismissed for default. The Opposite Party thereafter, filed a separate Misc. case under Section 151 of the Code of Civil Procedure, 1908 with a prayer to restore the original Misc. case number 12 of 2007. An application for stay in connection with title execution was also filed and vide an order dated May 6, 2022 the learned Court declined to grant any order of stay in connection with such title execution case no. 9 of 2013. Against the said Order dated May 6, 2022 a revisional application was filed before the Hon'ble Court being C.O number 1263 of 2022 and vide an Order dated June 16, 2022, the Hon'ble Court directed the Title Execution Case no. 9 of 2013 to be stayed subject to payment of ₹25,000 within three weeks from the date of such order pending decision of the Misc. Case filed for restoration, to be paid to the present petitioner/judgement debtor. However, further direction was given to the learned court to hear out the prayer for stay of execution proceedings in accordance with provisions of law.

4. It is submitted by the Learned Advocate that in compliance with the said order the cost has been paid to the present petitioner by the Opposite Party but the Learned Court after hearing the parties, allowed the said Misc. case

no. 21 of 2022 and the Misc. Case no.12/17 was directed to be restored subject to payment of cost of ₹21,000 within next 30 days.

5. Being aggrieved by and dissatisfied with the said order, this revisional application has been filed. It is submitted further that the Learned Court though observed that the laches on the part of the petitioner are evident and the evidence of the witnesses suffers from credibility of individual capacity, allowed the prayer for restoration with the observation that the petitioner cannot be held liable for the same, the petitioner/ judgement debtor cannot be perpetually prevented from being heard.
6. The Learned Advocate appearing on behalf of the Opposite Party argued that being the judgement debtor he has exercised his lawful right as the decree was passed beyond his knowledge. Pursuant to the said provision under Section 47 of the Code of Civil Procedure, all questions arising between the parties as to execution, discharge and satisfaction are to be decided by the executing Court, but the Misc. case filed by them was dismissed for default and as they failed to take steps on the date fixed on account of an accident, the Opposite Party didn't have the opportunity to controvert the allegation levelled against him by the petitioner/plaintiff.
7. It is further assailed that the Learned Court rightly allowed the application for restoration of the said Misc. case giving a right of audience to the petitioner, and he has complied with the direction by making payment of the cost of ₹25,000 as imposed by the Hon'ble High Court and subsequently by the Learned Court while allowing the restoration prayer. Accordingly, prays for dismissal of the revisional application.

- 8.** Admittedly, the suit filed by the petitioner was decreed long back in the year 2013 and was put to execution in the year 2017. During this 4 to 5 years, the present Opposite Parties did not challenge the said ex-parte decree before any forum, but filed the application under Section 47 of the Code of Civil Procedure in the said execution Case. On perusal of the impugned order, it transpires that since after August 2018, there was no development in the execution case on account of resolutions of local bar, and after that on July 20, 20 there was a change of advocate by the petitioner and after that, the present opposite party also engaged a new advocate and a cost of ₹300 was imposed on him which was fixed to be paid on 19. 11. 2019 and hearing of the Misc. case, as last chance.
- 9.** On account of, none appeared on behalf of the present Opposite Party direction was given to show cause by the opposite party. On 18. 12. 2019, again, the Opposite Party did not appear before the Court on the ground of an accident without filing show cause resulted the Misc. to be dismissed for default on 18. 12. 2019. The subsequent Misc. case under Section 151 of the code was filed on April 19, 2022 with an application for condonation of delay on account of spread of Covid virus which crippled the entire world since March 2020 registered as Misc. case 23/22.
- 10.** The stand taken for filing the restoration of the Misc. case was on account of accident, suffered by the learned advocate was without any medical paper. The petition filed before the Learned executing Court, contained only the factum of an accident in the last night as to why he was unable to come to Court to pay the cost and written objection to the execution application and prayed for time. The matter was heard on evidence. Mr. Arunangsu

Bera deposed as P.W.4 who filed the petition in that case on December 18, 2019 on behalf of the present Opposite Party who was not dealing with the case one on one and it was Utpal Babu's case, the conducting advocate who informed him about the accident suffered by Vivekananda and also about fracture of his leg. This testimony cannot be relied upon since the advocate heard from Utpal Babu the concerned advocate about the accident of the Opposite Party and the conducting advocate did not file the petition. From the cross examination it can be seen that this advocate represented the Judgement debtor/Opposite Party in Title suit number 65/2017, but he is not in touch with him however as per instruction of Utpal Babu, he was conducting the case.

- 11.** If the conduct of the opposite party in dealing with the case can be looked into it would show the utter negligence on the part of the opposite party to contest the proceeding as reflected in the written objection filed by the petition. Under Order IX Rule 13 of the Code the remedy was available to the defendant to apply for setting aside the Ex-parte decree or an appeal could have been filed under Section 96(2) of the Court Order. The judgement debtor filed the Misc. case under section 47 of the code of civil procedure instead of filing the above which got dismissed on 18/12/2019, but the application under Section 151 of the Code of Civil Procedure for restoration of Misc. case no. 21 of 2022 was filed long after 3 years along with an application under section 5 of limitation Act. The written objection filed against the application for restoration reveals that the present Opposite Party filed a Title suit no. 372/2001 against the present petitioner, which was dismissed for default on 13/6/2003 as they failed to file show cause

and did not take any step. The Opposite Party further filed a suit being Title suit no. 289 of 2016 against the present petitioners before the civil Judge second court at Uluberia, which was also dismissed for default on 4 April 2022. The original Title suit number 119 of 2006 filed by the present petitioners decreed ex-parte and the suit was fixed on the ex-parte board for number of years, and when after filing of execution case the beliefs first time went to execute the decree, the Opposite Parties initiated the Misc. case 12/2017 in the said execution case under section 47 of the code of civil procedure. After dismissal of the said Misc. case again, they initiated the Misc. case No. 21/2022 under section 151 of the code of civil procedure without any supporting document to substantiate he claim. The most interesting fact disclosed by the Learned Advocate of the petitioner, that though no step was taken by the opposite party in the said Misc. case 12/2017 he contested the survey petition which was fixed on the next date.

- 12.** One of the cardinal principles of law is that litigant have to be vigilant towards their right and specially when he suffered the ex-parte decree. In a recent decision of the Hon'able Supreme Court of India in Periyammal (dead) through LRs. ors. vs V.Rajamani & anr it has been observed that a harmonious reading of Section 47 with Order 21 Rule 101 implies that questions relating to right title or interest in a decretal property must be related to the execution, discharge or satisfaction of the degree. The import of such a reading of the provision is that only matters arising subsequent to the passing of the decree can be determined by an executing Court under Section 47 and Order 21 Rule 101. It is further observed taking note of

Rahul .S Shah versus Jitendra Kumar Gandhi ¹ that the benefit of Section 47 cannot be availed to conduct a retrial, causing failure of realisation of fruits of the decree. In the case of Periyammal (supra), the Hon'ble Apex Court revisited, the observations made in Rahul S.Shah (Supra) where in this court provided guidelines and directions to conduct the execution proceedings. The Hon'ble Court further directed the executing courts to dispose of the execution proceedings within six months from the date of filing which may be extended only by recording reasons in writing and in case of failure, the concerned Presiding Officer would be answerable to the High Court on its administrative side.

13. Therefore, from the above facts and circumstances of the case, along with the judicial pronouncement of Rahul Shah (Supra) and the observation of the Hon'ble Supreme Court in the case of peryammal (supra) the learned executing court ought to have considered the long pendency of the proceedings and chequered history attached with the case regarding the glaring negligence on the part of the Opposite Party without any sufficient cause, remitting severe delay in disposing of the execution application, and therefore the said order is liable to be set aside.

14. Therefore the cost as per direction of the learned executing court as said to be deposited by the judgement debtor is directed to be refunded. The Learned court must ensure that the said amount which is still lying with the court is to be remitted to the judgement debtor at an earliest.

15. Accordingly this revision all application stands allowed.

¹ 2021 6 SCC 418

- 16.** The order passed by the learned executing Court dated 06.09.2024 in Misc. case no. 12/2017 is hereby set aside.
- 17.** No order of costs.
- 18.** Urgent certified copy if applied by any of the parties to be supplied subject to observance of all formalities.

(CHAITALI CHATTERJEE DAS, J.)

