

CO 3833 of 2024

Arun Kanti Debnath & Anr.
vs.
Tapan Kumar Majumder & Ors.

Mr. A.K. Das

Mr. Dilip Kumar Sadhu

....for the petitioners

Affidavit-of-service filed by the petitioners is taken on record.

The opposite parties are not represented.

Learned counsel appearing on behalf of the petitioners submits that the opposite parties herein as plaintiffs filed a suit for partition against the present petitioners/defendants and that suit was decreed ex-parte in favour of the plaintiffs/opposite parties herein.

The petitioners herein submit that they preferred a Misc. Case under Order IX Rule 13 of the Code of Civil Procedure for setting aside the ex-parte decree as they want to contest the said suit. In this connection they also filed one application for stay of execution of the ex-parte preliminary decree till disposal of their Misc. Case filed under Order XI Rule 13 of the Civil Procedure Code. However, the learned Court below by the order impugned dated 25.06.2024, held that writ has already been issued to the Partition Commissioner for executing the preliminary decree and as such he refused to grant stay.

In genuine cases where the judgment debtor or other party may have a real and substantial grievance against the decree, such stay is necessary and the delay occasioned thereby in executing the decree is unavoidable. It is impossible to prescribe any hard and fast rule or to enumerate cases in which the courts ought and those in which, they ought not to order stay of execution. Sub-rule (1) of Rule 26 of Order XXI of CPC only Prescribes that the executing Court on “*sufficient cause being shown stay the execution of such decree for a reasonable period.*”

In the present context, no observation made by the Court below that the ground shown in the prayer for stay is insufficient or that the grievance against the ex-parte decree made by the petitioner is not real or not substantive but what prompted the court below to reject the petitioner’s prayer for stay is that partition Commissioner has already been appointed to execute the decree and unless report of Partition Commissioner is received, there is no ground to put a stay in execution proceeding. Such observation is clearly perverse and suffers from impropriety which calls for interference by this Court, invoking Courts jurisdiction under Article 227 of the Constitution of India.

When the petitioners have filed a Misc. Case under Order IX Rule 13 praying for setting aside the ex-parte decree, the Court below ought to have

disposed of the said Misc. Case at the earliest and till then execution of the decree ought to have been stayed.

In view of the above, **CO 3833 of 2024** is hereby **disposed of** with a direction upon the Court below to dispose of the petitioners Misc. Case under Order IX Rule 13 being Misc Case No. 04 of 2024 at the earliest without granting any unnecessary adjournment to any of the parties and to conclude the Misc. Case proceeding preferably within a period of three months from the date of communication of this order.

The order impugned thus stands set aside.

Till disposal of the Misc. Case being No. 04 of 2024, the execution of the ex-parte preliminary decree passed in Title Suit No. 45 of 2023 shall remain stayed.

(Dr. Ajoy Kumar Mukherjee, J.)