

(2012) 10 CAL CK 0002

Calcutta High Court

Case No: C.O. No. 2589 of 2009

M/s. Mahavir Properties Private
Limited

APPELLANT

Vs

The Lakshmi Commercial Bank
Limited Presently known as
Canara Bank

RESPONDENT

Date of Decision: Oct. 18, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 47
- Limitation Act, 1963 - Section 5

Hon'ble Judges: Prasenjit Mandal, J

Bench: Single Bench

Advocate: S.P. Roy Chowdhury, Mr. D.S. Mishra and Mr. S.K. Mishra, for the Appellant;
Saptangshu Basu and Mr. S. Das, for the Respondent

Final Decision: Dismissed

Judgement

Prasenjit Mandal, J.

Challenge is to the Order No. 157 dated July 8, 2009 passed by the learned Judge, City Civil Court, 2nd Bench, Calcutta in Misc. Case No. 1787 of 1993 arising out of the Title Execution Case No. 90 of 1986. The opposite party got a decree relating to agreement for lease on compromise in Title Suit No. 150 of 1976 against the petitioner and the said decree was put into execution being Title Execution Case No. 90 of 1986. In that Execution proceeding, the judgment-debtor filed an application u/s 47 of the CPC and the said application was converted into the Misc. Case No. 1787 of 1993.

2. By the impugned order, the learned Executing Court allowed the said Misc. Case in part on contests and the learned Executing Court has held that the decree-holder/opposite party herein is entitled to get an accommodation of 2000

sq.ft out of 6000 sq.ft and that it could put the decree into execution accordingly.

3. Being aggrieved, this application has been preferred.

4. Now, the question is whether the impugned order should be sustained.

5. Having heard the learned Advocates of both the sides and on perusal of the materials-on-record, it appears that the Title Suit No. 150 of 1976 was decreed on compromise in terms of the Solenama on June 9, 1976. As per Solenama, the petitioner is bound to deliver 6000 sq.ft of space to the opposite party upon certain terms and conditions, such as, consideration money to be paid at the rate of Rs. 100/- per sq.ft, etc. The bank was also required to pay a sum of Rs. 29,010/- by way of rent.

6. Admittedly, for the purpose of construction of the new building in place of the old building, the opposite party/bank advanced a sum of Rs. 3,50,000/- to finish the construction to the petitioner.

7. Admittedly, out of the 6000 sq.ft space, the bank got possession of 4000 sq.ft. Under the circumstances, the petitioner has contended that the decree-holder cannot put the decree into execution for the entire 6000 sq.ft. It has also contended since the bank made delay in making the payment, the rest space of 2000 sq.ft had been let out to a third party and at present, the decree-holder cannot get the possession of that space.

8. While disposing of the said Misc. Case, the learned Executing Court has held that the petitioner has failed to make it clear before the Court when it completed the construction of the entire 6000 sq.ft of space on the first floor and when it asked the bank to take delivery of possession of that space, after taking payment of the construction. It also failed to establish that the petitioner had let out the rest 2000 sq. ft to the third party and any way, the matter for execution of the case is being dragged since 1986 till date.

9. The petitioner has also contended that the opposite party has failed to pay the consideration in respect of the area over which the bank already got possession and as such, a sum of Rs. 12,17,173/- by way of consideration and interest became due and payable as on March 31, 2003. In any way, the Executing Court cannot go behind the decree.

10. In the instant case, the Execution Case has been filed for recovery of possession and if the judgment-debtor has any claim in respect of money or other claims, such as, interest, etc, that is a separate issue. The judgment-debtor may show that the decree-holder is still to discharge his obligations.

11. So far as the application u/s 47 of the CPC is concerned, I find that execution of the decree is resisted on the ground that the Execution Case is not maintainable on the ground as recorded above as per contention of the petitioner. Since, the

Executing Court cannot go behind the decree, so far as the findings of the learned Executing Court to the effect that the decree-holder is still entitled to get an accommodation of 2,000 sq. ft of space out of 6000 sq.ft space and it could put the decree into execution are concerned, in my view, these findings cannot be wriggled out.

12. Mr. S.P. Roy Chowdhury, learned Senior Advocate appearing for the petitioner, has referred to the decision of [Chen Shen Ling Vs. Nand Kishore Jhajharia](#), and thus, he has submitted that when a decree provides mutual obligations on both the appellants and respondents in such a way that the performance of one is conditional on the performance by the other and accordingly no execution can be ordered unless the party seeking execution not only offers to perform his part but when objection was taken, satisfy the executing court that he was in a position to do so. As the decree has to be executed as a whole the non-compliance with the terms thereof by the appellant precludes him from executing that part of it against the respondent.

13. Mr. Roy Chowdhury has next referred to the decisions of [Jai Narain Ram Lundia Vs. Kedar Nath Khetan and Others](#), and [Habib Mian and Another Vs. Mukhtar Ahmad and Another](#), (Full Bench) and thus, he has submitted that a compromise decree is a creature of the agreement on which it is based and is subject to all the incidents of such agreement, that it is but a contract with the command of a Judge superadded to it and in construing its provisions the fundamental principles governing the construction of contracts are applicable.

14. Thus, Mr. Roy Chowdhury has submitted that, since the decree-holder has not complied with his obligations, the execution application should be dismissed.

15. Mr. Roy Chowdhury has also contended that according to the decision of Brij Indar Singh v. Kanshi Ram reported in 45 Indian Law Reports 94 and thus, he has submitted that the said Title Execution Case was dismissed on two occasions for default. Thereafter, the decree-holder filed an application u/s 5 of the Limitation Act along with the application for restoration after the dismissal of the execution application for the second time. But the petitioner was not given a notice of the Title Execution Case and also the restoration of the same. As such, notice under Order 21 Rule 22 of the CPC was to be served on the petitioner herein.

16. With due respect to Mr. Roy Chowdhury, I am of the view that this is not an appeal, but, this Court is to consider whether the impugned order dated July 8, 2009 passed in the said Misc. Case should be sustained or not. So, the question of service of notice is beyond the scope of consideration for the time being in the revisional application.

17. This Bench should confine its findings over the impugned order particularly, the concluding part of the order relating to the delivery of possession for the remaining portion of 2000 sq.ft and not beyond that.

18. So far as the mutual obligations are concerned, the learned Executing Court may give appropriate directions to the decree-holder to make payment for dues as obligations and at present, this is not also in consideration within the domain of the application.

19. After adjustment of the loan advanced by the bank, if any amount is due that could be taken care of by the Executing Court for the purpose of execution of the decree. The obligation on the part of the judgment-debtor to deliver rest possession of 2000 sq.ft cannot be ignored at all because parties had arrived at such a conclusion long time back.

20. In that view of the matter, I am of the opinion that the prayer for the dismissal of the execution case of the petitioner has been rightly rejected.

21. The findings of the learned Executing Court in respect of delivery of possession of the rest portion of the suit property in favour of the decree-holder should be sustained.

22. Accordingly, there is no scope of interference with the impugned order.

23. The application is, therefore, dismissed.

24. Considering the circumstances, there will be no order as to costs. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.