

(2005) 02 CAL CK 0038**Calcutta High Court****Case No:** Co. No. 1276 of 2003

Dipali Biswas and Others

APPELLANT

Vs

Nirmalendu Mukherjee and
Others

RESPONDENT

Date of Decision: Feb. 11, 2005**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 90, Order 9 Rule 9
- Constitution of India, 1950 - Article 227

Citation: 109 CWN 475**Hon'ble Judges:** Girish Chandra Gupta, J**Bench:** Single Bench**Advocate:** J. Islam and Z. Islam, for the Appellant; Dhruba Bhattacharjee and Anima Maity, for the Respondent**Final Decision:** Dismissed**Judgement**

Girish Chandra Gupta, J.

The petitioners were the defendants in a suit instituted before the Trial Court for recovery of money. The suit was decreed against the petitioners and put into execution. A Money Execution Case No. 2 of 1975 was started. In the aforesaid execution proceeding, the property of the petitioners was put up for sale in order to satisfy the decretal debts due to the plaintiffs in that suit. The opposite parties purchased the property of the petitioners at a sum of Rs. 5500/- in an auction sale. The petitioners challenged the sale under Order 21 Rule 90 of the C.P.C. The challenge thrown by the petitioners failed. During further proceedings challenging the aforesaid order the petitioners and the opposite parties tried to settle the matter on the basis that, the opposite parties shall go out of the picture and give up all their rights and claims in respect of the property purchased by them in the event the entire dues of the auction purchaser were paid or deposited in court within 15th December, 1980 by the petitioners. The conditional-compromise-application filed by

the contesting parties is annexure P-1 to this application.

2. The petitioners deposited a sum of Rs. 3,700/- to the credit of the decree holder in court which was duly withdrawn by the decree holder with consent of the petitioners as would appear from annexures P-2, P-3 and P-4. The decree, thus, stood satisfied.

3. The opposite parties refused to treat the deposit as sufficient on the ground that the petitioners had not deposited a sum of Rs. 5,500/- and, therefore, the solenama according to them had failed. No one appears to have realised at any stage that the object of selling the property had ceased to exist and the auction purchasers could have, merely for asking, obtained refund of the sum of Rs. 5,500/- deposited by them in Court. The opposite parties tried to proceed with the execution case for recovery of possession of the property. The Executing Court dismissed the application for execution.

4. Aggrieved by that order, the opposite parties came up before this court. The matter was remanded for further hearing which again came back to this court and was set at rest by the order dated 20th December, 1990 passed by this court in Civil Revisional Jurisdiction. This court held that:

in view of the compromise petition and the failure of deposit in accordance with the compromise petition it is quite clear that the auction purchase made by the applicant before me is confirmed and finalised and is unassailable today.

5. However, the aforesaid order dated 20th December, 1990 was passed ex parte. The petitioners applied for recalling the order dated 20th December, 1990. The matter was once again gone into and ultimately the application for recalling was dismissed.

6. Aggrieved by the order of dismissal, the petitioners preferred a SLP which was also dismissed by an order dated 24th February, 1992.

7. Prior to the order dated 20th December, 1990, based on the order of dismissal of the application for execution passed by the Executing Court, the petitioners in the belief that they were entitled to construct on the land appear to have raised a construction. The opposite parties sought to resist such construction by filing a suit which was registered as Title Suit No. 153 of 1988 claiming a declaration that the opposite parties were the lawful owner of the land in question and permanent injunction restraining the petitioners from raising any construction thereat. An Interlocutory application was made by the opposite parties which, however, was dismissed by the Trial Court by the opposite parties which, however, was dismissed by the Trial Court by an order dated 15th September, 1988.

8. There is no dispute that the aforesaid Title Suit No. 153 of 1988 was not ultimately proceeded with by the opposite parties and eventually was dismissed for default on 10th January, 1990.

9. After dismissal of the Special Leave Petition, the opposite parties appear to have taken further steps seeking delivery of possession. The petitioners tried to resist such an order being passed. The objection was overruled by the Executing Court and writ for delivery of possession was issued. The petitioners went up in revision before the District Judge, the District Judge refused to interfere.

10. Against the refusal, the petitioners came up before this court under Article 227.

11. Mr. Islam, the learned Advocate, appearing for the petitioners, submitted that once the opposite parties got their suit claiming a declaration of title in respect of the land, in question, dismissed for default, they are estopped in law from claiming any right in respect of the self-same land. He submitted that it was open to them to pray for an order setting aside the order of dismissal for default which they did not do and in law the opposite parties are precluded from filing a fresh action on that basis. He relied in this regard on the provision of Order 9 Rule 9 which provides that "where a suit is wholly or partly dismissed under Order 9 Rule 9 of the Civil Procedure Code, the plaintiffs are precluded from bringing a fresh suit in respect of the same cause of action." He submitted that when the opposite parties consciously got their suit dismissed and did not take any step for the purpose of restoration of the same they are estopped from claiming any title with regard to the land in question and this is precisely what they have done. He submitted that this point of law was not considered by the learned Executing Court nor by the revisional court.

12. Mr. Bhattacharjee, the learned Advocate, appearing for the opposite parties, submitted that the submissions of Mr. Islam are without substance, it would appear from the order dated 15th September, 1988 a copy whereof is Annexure "P-8" to the petition under Article 227 that the contention advanced by the petitioners before the Trial Court at the hearing of application for injunction was that "the defendant contended that vide order no. 62 dated 20-12-1980 the auction sale was set aside on full satisfaction by this court. As such the claim of the plaintiff in respect of the suit land by purchase was end. The right, title and interest of defendant no. 1 in respect of suit land was established." He accordingly submitted that how can a litigant be allowed to blow hot and cold. On the one hand the petitioner contended that the opposite parties had not acquired any right in respect of the suit property and the suit was premature. If that were so then how could dismissal of the suit alter the situation? He also submitted that this contention should have been raised before Hon'ble Justice Ray when the order dated 20th December, 1990 was passed.

13. Mr. Islam, the learned Advocate, for the petitioners, in reply submitted that the order dated 20th December, 1990 was passed ex parte. Therefore, he had no opportunity to make any submission and the subsequent application, which was made, was for recalling of the order dated 20th December, 1990. He further submitted that in any event the order dated 20th December, 1990 was passed in an application wherein the subject matter of challenge was an order dated 11th July, 1987 and the petitioner could not have legitimately fallen back on the order of

dismissal of the suit passed in 1990.

14. Estoppel created by the provision of Order 9 Rule 9 of the Civil Procedure Code, is statutorily binding upon the opposite parties. Moreover court should also take notice of the fact that the opposite parties by their inaction have allowed the petitioners to go ahead with the construction of the building by which the nature and character of the land, in question, has been changed and the opposite parties acquiesced thereto. Once there was such an acquiescence on the part of the opposite parties, they should be allowed to make any claim with regard to the land in question.

15. He further submitted that his clients are willing to compensate to opposite parties by whatever amount the court thinks fit and as a matter of fact he already had offered a sum of Rs. 1 lakh to the opposite parties. He, accordingly invited this court to set aside the order under challenge on such terms as to this court may seem proper.

16. Mr. Bhattacharjee, the learned Advocate, appearing for the opposite parties, submitted that the estoppel contemplated under Order 9 Rule 9 of the Civil Procedure Code, is applicable only in a case where a fresh suit is filed to which Mr. Islam submitted that any action intended at obtaining the same relief shall be hit by the provision and there is no reason why a restricted meaning should be given as urged by Mr. Bhattacharjee. With regard to the offer of Mr. Islam to compensate the opposite parties by paying a sum of Rs. 1 lakh. Mr. Bhattacharjee submitted that his client is willing to pay a sum of Rs. 1 lakh to the petitioner in order to buy peace. It is, therefore, clear that the offer is rejected by Mr. Bhattacharjee.

17. After considering the submissions made by the learned advocates, for the parties, this court is of the view that there can be no denial that there has been some amount of acquiescence on the part of the opposite parties. Not only that they did not challenge the order dismissing the application for injunction but they got the suit dismissed for default. The opposite parties did not apply for any interim order in the Revisional Application pending before the High Court in order to restrain the petitioners from constructing the building. They have consciously allowed the petitioners to raise the construction. In a sense by their inaction they allowed the petitioners to change the nature and character of the suit property as also to act to their detriment. At the same time, this court cannot lose sight of the fact that the application for recalling the order dated 20th December, 1990 failed and a SLP preferred by the petitioners was not entertained by the Apex Court. A review petition was also rejected by the Apex Court. This court is, therefore, not inclined to interfere in this matter regard being had to the judicial decorum. Accordingly, this revisional application is dismissed. There shall however be no order as to costs.