

**84 CWN 506**

**Calcutta High Court**

**Case No:** Civil Order No. 446 of 1980

Kripamay Mukherjee

APPELLANT

Vs

Dhirendra Nath  
Mukherjee

RESPONDENT

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**Date of Decision:** March 3, 1980

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 47

**Citation:** 84 CWN 506

**Hon'ble Judges:** B.C. Chakraborti, J; A.K. Sen, J

**Bench:** Division Bench

**Advocate:** Kamal Krishna Chakraborty, for the Appellant; Subhas Chandra Basu, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

A.K. Sen and B.C. Chakrabarti, JJ

1. This is a revisional application at the instance of the decree-holder and is directed against an order dated November, 19, 1979, passed by the learned Subordinate Judge, 8th Court, Alipore, in Title Execution Case No. 22/74. By the order impugned the learned Subordinate Judge had stayed further proceedings of the execution case pending disposal of an objection u/s 47 of the CPC which has been registered as Misc. Case No 16/79. The revisional application is being heard on contest by the judgment debtor objector in Misc. Case No. 16/79. Certain facts are not very much in dispute. The decree-holder (petitioner before us) obtained a decree for eviction as against the judgment-debtor from the suit premises to which the decree-holder claims title on the basis of two Wills, one by his grandfather Becharam Mukherjee who died in the year 1933 and the other by his grandmother Nagendra Bala who died in 1956. Probate in respect of Becharam's will was obtained by the executor in probate case No, 113/34 while the probate of Nagendra Bala's will was obtained in probate case No. 17/58. The latter

probate was obtained though it was contested by the present judgment debtor and such probate was upheld up to this Court. It is only after the decree-holder got his title established on grant of probate as aforesaid, he instituted the suit resulting in the decree now under execution.

2. It appears that when the decree was put into execution, several attempts were made to frustrate the execution. A proceeding for revocation of the grant made in respect of Becharam's will was instituted as late as in October 1977 by the present, judgment-debtor opposite party which is now pending. A suit had also been filed by the judgment-debtor opposite party for declaration of their title in their fractional share in respect of the suit property which is also pending. Injunction in both the proceedings was sought for so as to restrain the present decree-holder from executing the decree now under execution. But such prayer for injunction was ultimately refused. At this stages the judgment-debtors have put in the objection u/s 47 of the Code and the foundation of the objection is the same as in the foundation of their claim in the suit, for declaration of title, namely, that the will of Becharam is a forged one and that the will executed by Nagendra Bala was not a voluntary act on her part but was the result of fraud and misrepresentation. Pleading as such in the objection u/s 47 of the Code, the judgment-debtors plead that the decree is not binding. Now prima facie the executing court has, in our view, no jurisdiction to go into the question whether the probate in respect of the two wills which constitutes the foundation of title of the decree-holder, had been lawfully granted or not. Such being the position, the objection u/s 47 of the Code appears prima facie to be a frivolous one which has been filed only when the judgment debtor failed to obtain an injunction from the appropriate court where the proceeding for revocation of the grant is still pending. This aspect the learned executing Court wholly over-looked in granting the stay by the order impugned pending disposal of the objection u/s 47 of the Code. Such being the position, we are of the view that the order impugned had been passed clearly in irregular exercise of his jurisdiction. The order impugned is set aside and the learned executing court is directed to proceed with the execution forthwith.

The revisional application is accordingly allowed. The order be communicated to the court below.