IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Before:
The Hon'ble Justice Hiranmay Bhattacharyya

C.O. 1261 of 2026
Rathin Mitra & Ors.
Vs.
Balai Chandra Mitra & Anr.

For the Petitioners : Mr. Gopal Chandra Ghosh, Sr. Adv.
Mr. Samiran Ghosh
Ms. Rameshwar Sinha
..... advocates

For the respondent no. 1 : Mr. Debasish Roy, Sr. Adv.
Mr. Snehasis Jana
Mr. Sukanta Das
.... advocates

Reserved on : 08.07.2026

Judgment on : 01.10.2026

Hiranmay Bhattacharyya, J.:-

1. This application under Article 227 of the Constitution of India is at the instance of the defendants/Judgment Debtors/appellants and is directed against an Order being no. 36 dated 25.02.2026 passed by the learned District Judge, Paschim Medinipur in Title Appeal No. 16 of 2022 arising out of Title Suit No. 36 of 2001.

2. By the order impugned, the prayer for stay of all further proceedings of the Title Execution Case stood rejected.

3. Facts giving rise to this civil revision application, in a nutshell, are as follows-

The Opposite Party no. 1 herein filed a suit for recovery of possession of the suit property being Title Suit No. 36 of 2001 against the predecessor-in-interest of the petitioners namely Kanailal Mitra, since deceased. The said suit was decreed ex parte by a judgment and decree dated 10.07.2012. Kanai filed a Misc. Case no. 06 of 2012 under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the ex parte decree. The said Misc. Case stood dismissed for default on 04.11.2016. Kanai filed a J. Misc. Case No. 13 of 2016 under Order 9 Rule 9 of the Code for restoration of Misc. Case no. 06 of 2012. In the meantime the ex parte decree was put into execution giving rise to Title Execution Case No. 02 of 2017. Upon the death of Kanai, the petitioners were substituted in the Execution Case. Petitioners filed Title Appeal no. 16 of 2022 challenging the judgment and Decree dated 10.07.2012 and filed an application for condonation of delay. In the said appeal, petitioner prayed for an order of stay of the Execution Case.

4. The stay application, stood rejected by the impugned order. Being aggrieved, appellants have approached this Court.

5. Mr. Ghosh, learned Senior Advocate for the petitioners contended that unless the further proceedings of the execution case is stayed, the appeal filed by the petitioner under Section 96 of the Code would become infructuous. He contended that the prayer for stay was rejected only on the ground that the delay in preferring the Title Appeal has not yet been condoned and the appeal is yet to be admitted. He further submitted that the expression "shall" used in Order 41 Rule 3A is directory and not mandatory. He contended that the provisions under Order 41 Rule 3A of the Code cannot be construed to be an absolute prohibition and the Court in exercise of its inherent powers can pass an order of stay for the ends of justice. In support of the aforesaid contentions, Mr. Ghosh, placed reliance upon the decisions in the case of **Ram Ch. Sinha vs. Sm. Protiva Dutta** reported at **1978(2) CLJ 462**; **Durgapada Patra vs. Estate Officer, SER & Anr.** reported at **(2018) 4 CHN 523**; **Sri Rani Satiji Mandir and others vs. Shyam Sundar Jhunjhunwala and others** reported at **AIR 1984 Cal 20**

and the decision of the Bombay High Court in **Bhagwan vs. Kachrulal** reported at **1987 SCC Online Bom 32**.

6. Mr. Roy, learned Senior Advocate for the Opposite Party no. 1 seriously disputed the submissions of Mr. Ghosh. He contended that the petitioners have availed of various recourses in order to frustrate the execution of a decree for recovery of possession. He contended that Kanai and his successors-in-interest i.e., the petitioners were/are not diligent in prosecuting the suit, appeal as well as the miscellaneous cases. He contended that after the arguments were heard-in-part in the J. Misc. Case No. 02 of 2022 filed by the decree holder/opposite party no. 1 under Order 21 Rule 97 of the Code, petitioner filed a petition before the learned Executing Court stating that an appeal has been filed against the ex parte decree. He further submitted that there is an inordinate delay of about 10 years in filing the said appeal and unless the delay is condoned and the appeal is heard under Order 41 Rule 11 of the Code, execution of the decree cannot be stayed.

7. Mr. Roy strenuously contended that Order 41 Rule 3A(3) of the Code creates an absolute embargo upon the Court's power to pass an order for stay of the execution of the decree during pendency of an application for condonation of delay in preferring the appeal. In support of such contention he placed reliance upon the order of the Hon'ble Bombay High Court (Panaj Bench) in the case of **Luis Antonio Romualdo vs. Linda D Souza E Fernandes**; **Tony Fernandes**; **Mary Viegas Souza** reported at (**2019) 1 MhLJ 656**. He placed reliance upon the decision of the Hon'ble Supreme Court of India in the case of **State of West Bengal vs. Somdeb Bandyopadhayay** reported at **(2009) 2 SCC 694** in support of his contention that interim orders cannot be passed unless the delay in filing the appeal has been condoned.

8. Mr. Roy placed strong reliance upon the decision of the Hon'ble Supreme Court in the case of **Rahul S Shah vs. Jinendra Kumar Gandhi and others** reported at **(2021) 6 SCC 418** in support of his contention that execution case should be disposed of within 6 months from the date of filing. He, thus,

contended that since the execution case is pending from 2017 and the Misc. Case for police help is at the argument stage, no order of stay should be passed.

9. Mr. Roy referred to an order dated August 4, 2021 passed by a co-ordinate bench in C.O. 229 of 2020 whereby the order dated 09.12.2019 passed by the learned Executing Court allowing the Judicial Misc. Case No. 6 of 2018 under Section 47 of the Code was set aside with costs. He contended that the Special Leave Petition filed against the aforesaid order also stood dismissed as withdrawn by an order dated 04.08.2021. Mr. Roy concluded by submitting that this application is liable to be dismissed.

10. Heard the learned counsels for the parties and perused the materials placed.

11. The issue that falls for consideration is whether the appellate Court was justified in rejecting the prayer for stay of execution of the decree merely on the ground that the appeal has not yet been admitted on the ground of pendency of the application for condonation of delay.

12. Before entering into the factual matrix, it would be beneficial to recapitulate the provisions of Order 41 Rule 3A of the Code and the same is extracted hereinafter.

> *"**3-A. Application for condonation of delay**.-(1) When an appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period.*
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> *(2) If the Court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under Rule 11 or Rule 13, as the case may be.*
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> *(3) Where an application has been made under sub-rule (1), the Court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under Rule 11, decide to hear the appeal."*

13. Upon a conjoint reading of Order 41 Rule 3A(1) and (2) of the Code, this Court is of the considered view that a time barred appeal cannot be taken up for hearing under Rule 11 without the application for condonation of delay being decided.

14. Order 41 Rule 3A(3) of the Code, however, creates an embargo upon the power of the Court to make an order for stay of execution of the decree until the Court decides to hear the appeal.

15. The Hon'ble Supreme Court in the case of **Sushil Kumar Sen vs. State of Bihar** reported at **(1975) 1 SCC 774** held that the procedural law so dominates in certain systems so as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act *ex debito justitia* where the tragic sequel otherwise would be wholly inequitable.

16. The Hon'ble Supreme Court in **State of Punjab vs. Shamlal Murari** reported at **(1976) 1 SCC 719** held that procedural law is not to be tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

17. Order 41 Rule 3A of the Code is a procedural law. The prescriptions under the aforesaid rule cannot thus be a resistant in the administration of justice. In the light of the aforesaid discussion, this Court holds that Rule 3A(3) inspite of the word "shall" used therein is directory and not mandatory. However, the aforesaid view expressed by this Court should not be misconstrued to be laying down a proposition that the appellate Court shall make an order for the stay of execution of the decree against which the appeal has been proposed to be filed at the mere asking, without the application for condonation of delay being decided and the appeal being heard under Order 41 Rule 11 of the Code.

18. Keeping in mind the object behind insertion of Order 41 Rule 3A by the Amendment Act, 1976, this Court holds that ordinarily courts shall not make an order for stay of the execution of the decree so long as the Court does not after hearing under Rule 11 decide to hear an appeal. Such procedure is to be followed as a rule and departure therefrom would be by way of exception.

19. The co-ordinate bench in **Durgapada Patra** (supra), held that Sub-rule (3) cannot be said to be rigid and free from any exception and only in exceptional and extraordinary circumstances, the Court may pass an order of stay as by the time the application for condonation of delay is decided and the decree complained of is executed in its entirety, the position may become irreversible.

20. Another co-ordinate bench in **Ram Ch. Sinha** (supra), after noting the provisions of Order 41 Rule 3A of the Code held that such prohibition cannot be construed as an absolute prohibition, because cases may arise where it will be doing injustice to deny the stay of the execution of the decree appealed against.

21. The Hon'ble Division Bench of the Bombay High Court in **Bhagwan** (supra) held that the legislature did not intent that the right of appeal should be frustrated by refusal to stay execution of decrees during the interregnum between proceeding under Order 41 Rule 3A and Order 41 Rule 11 and the word "shall" employed in Order 41 Rule 3A(3) is permissive and not mandatory.

22. It follows from the aforesaid discussion that the Court can depart from the mandate under sub-rule (3) and act *ex debito justitia* only in exceptional and extraordinary circumstances. In other words, the Court can exercise its residuary power and act *ex debito Justitia* if the consequences of not exercising such powers, would be inequitable. It should also be kept in mind that equity is not a one-way traffic.

23. In view of the aforesaid proposition of law, this Court has to now consider whether the petitioners could make out a case within the parameters of exceptional and extraordinary circumstances.

24. Record reveals that after the suit for recovery of possession was decreed ex parte on 10.07.2012, predecessor-in-interest of the petitioners applied under Order 9 Rule 13 of the Code for setting aside ex parte decree, which stood dismissed for default on 04.11.2016. Thereafter, a Misc. Case under Order 9 Rule 9 of the Code was filed for restoration of the aforesaid Misc. Case which is still pending. In the meantime the decree was put into execution in the year 2017. Petitioners after being substituted in the execution case in place of the Judgment Debtor filed an objection under Section 47 of the Code which ultimately stood dismissed with cost by a co-ordinate bench by an order dated 09.12.2019 passed in C.O. No. 229 of 2020. The Special Leave Petition against such order also stood dismissed as withdrawn on 29.10.2021. Decree Holder/Opposite party no. 1 filed a Misc. Case under Order 21 Rule 97 of the Code for removal of obstruction on 25.04.2022. Parties adduced their evidences in the said Misc. Case and arguments have been heard in part. In the meantime, petitioners preferred an appeal being Title Appeal No. 16 of 2022 challenging the ex parte decree with an inordinate delay of about 10 years.

25. An application was filed for condonation of delay in presenting the said appeal. It is not in dispute that since there was an inordinate delay of 10 years, the Opposite Party no. 1 prayed for an opportunity to cross-examine on the evidence tendered by the petitioners for condonation of delay. The learned Judge of the Appellate Court by an order dated 20.07.2022 held that liberty should be given to the parties to adduce evidence both oral and documentary in respect of condonation of delay. The said order attained finality and was acted upon by the parties. The evidence on condonation of delay is yet to be concluded.

26. Mr. Ghosh would contend that the delay in disposal of the application under Section 5 of the Limitation Act is only for the reason that the opposite party

no. 1 insisted for adjudication of such application on oral and documentary evidence.

27. The conduct of the respondents before the appellate Court may be one of the factors for deciding whether this is a fit case for making a departure from the normal rule and act *ex debito Justitia*. However, the conduct of the appellant is also one of the relevant factor for exercise of discretion by the appellate Court and the same cannot be glossed over.

28. From the order sheets of the appellate Court appended to this civil revision application, this Court finds that on several occasions, petitioner prayed for time which were allowed and on some occasions cost was also imposed. Though the predecessor-in-interest of the petitioners filed a Misc. Case under Order 9 Rule 13 but it stood dismissed for default and after a long time the Title Appeal under Section 96 of the Code was filed challenging the ex parte decree. Prior to filing of the said Appeal, petitioner took several steps challenging the maintainability of the execution case. When the Misc. Case was at the argument stage, petitioners filed the instant stay petition.

29. After noticing the conduct of the petitioners as recorded (supra) in carrying on with several proceedings after passing of the ex parte decree, this Court is of the considered view that this is not such an exceptional case for the Court to pass an interim order of stay of execution of the decree despite the prohibition under sub-rule (3) of Rule 3A of Order 41 of the Code. The petitioners have taken all possible steps to thwart the execution proceedings.

30. In **Somdeb Bandhyopadhyay** (supra), the Hon'ble Supreme Court held that passing of interim orders without condoning the delay and entertaining the appeal is impermissible. The said proposition shall squarely apply to the case on hand.

31. In the light of the aforesaid discussion, this Court holds that the learned Judge of the appellate Court cannot be faulted for not passing an interim order of stay in the facts of the case on hand.

32. The issue is decided in the affirmative and against the petitioner.

33. At this stage it would not be out of place to note that in **Rahul S Shah** (supra), the Hon'ble Supreme Court was pleased to direct that the Executing Court must dispose of the execution proceedings within 6 months from the date of filing. Therefore, before passing an order of stay, courts should consider whether it is a fit case for passing an order of stay of the execution case.

34. To the mind of this Court, an order of stay should not be passed mechanically only on the ground that an appeal is pending against the decree which is put into execution.

35. The decision in **Luis Antonio Romuddo** (supra) also recognizes the power of the appellate Court to pass an order of stay for a limited period inspite of prohibition created by Rule 3A. The said decision cannot, therefore, come to the aid of the opposite party no. 1.

36. In **Rani Satiji Mandir** (supra), the Hon'ble Division Bench held that an interlocutory order can be stayed for an interim period if the justice of the case so demands, provided an application for condonation of delay is there. The Hon'ble Division Bench held that Rule 3A will not stand as a bar for grant of limited stay of an interlocutory "order" in view of the fact that Order 41 Rule 3A of the Code cannot apply in case of an "order" by virtue of Order 43 Rule 2. The said decision being distinguishable on facts cannot be applicable to the case on hand.

37. For all the reasons as aforesaid, C.O. 1261 of 2026 stands dismissed. There shall be, however, no order as to costs.

38. Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(HIRANMAY BHATTACHARYYA, J.)