

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Revision No. 112 of 2013

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1. Deo Nandan Singh, Son of late Sadhu Singh.

2. Naresh Prasad Yadav, Son of Sri Sheo Prasad Yadav.

Both Resident of Mohalla- Baratpur, Police Station- Aurangabad, District- Aurangabad.

3. Rampati Singh, Son of Late Deoki Sing, Resident of Village- Naugarh Tola Sahay Bigha, Police Station- Aurangabad, District- Aurangabad.

4. Brajesh Kumar, Son of Mundrika Singh, Resident of Village- Kanhai, Police Station- Madanpur, District- Aurangabad.

.... Decree Holders/ Petitioners

Versus

1. Devi Nandan Singh, Son of Late Durga Singh.

2. Rakesh Singh, Son of Late Durga Singh.

Both Resident of Village- Naugarh, Police Station- Aurangabad, District- Aurangabad.

3(A) Surendra Singh, Son of Late Janardan Singh

3(B) Nagendra Singh, Son of Late Janardan Singh, both Resident of Village- Dabura Khurd, Police Station- Aurangabad, District- Aurangabad.

4. Bindeshwar Singh.

5. Ram Bilas Singh, Both Sons of Deo Nandan Singh.

6. Arun Singh.

7. Sunil Singh. Both Sons of Nemuarain Singh, Resident of Village- Bakashi Bigha, Police Station- Rafiganj, District- Aurangabad.

.... Judgment Debtors/ Opposite Parties

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Appearance :

For the Petitioner/s : Mr. Salahuddin Khan, Adv.
Mr. Roy Shivajee Nath, Sr. Adv.
Mr. Rambali Jha, Adv.
Mr. Sunil Kumar Sinha, Adv.
Mr. Parmad Kr. Adv.

For the Opposite Party : Mr. Jitendra Kishore Verma, Adv.
Mr. Mrigendra Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA

CAV JUDGMENT

Date: 13-12-2017

Petitioners are decree holders and they filed Execution



Case No. 08 of 2009 for execution of decree passed in Title Suit No. 78 of 1993/ 16 of 1994 but the aforesaid execution case was dismissed by the learned Sub Judge-1, Aurangabad passing impugned order dated 29.05.2013 on the ground that decree holders/petitioners failed to mention the date of their dispossession and in absence of above stated pleading, the decree for recovery of possession could not be executed.

2. Shorn to unnecessary details suffice it to say that decree holders/petitioners filed Title Suit No. 78 of 1993/ 16 of 1994 against the judgment debtors/opposite parties for declaration of their right, title and confirmation of possession and also delivery of possession, if they are found dispossessed during pendency of the aforesaid suit. The above stated title suit was decreed on 21.12.1995 and the judgment debtors/opposite parties filed Title Appeal No. 02 of 1996/ 13 of 1998 which was dismissed on 05.04.2003 by the 1st appellate court. The judgment debtors/opposite parties preferred 2nd appeal bearing 2nd Appeal No. 130 of 2003 which was, too, dismissed on 01.05.2008.

3. It is pertinent to note here that judgment debtors/opposite parties preferred S.L.P. (civil) No. 16789 of 2009 before the Apex Court of this country and the said special leave petition was dismissed on 31.07.2009. It is also pertinent to note here



that when the above stated Title Suit No. 78 of 1993/ 16 of 1994 was decreed and Title Appeal No. 02 of 1996/ 13 of 1998 was pending, the decree holders/petitioners filed Execution Case No. 01 of 1996 before the court of Sub Judge-1, Aurangabad but the learned Sub Judge-1, Aurangabad dismissed the aforesaid Execution Case No. 01 of 1996 passing order dated 31.01.1997 on the ground that decree passed in Title Suit No. 78 of 1993/ 16 of 1994 was vague and was not executable. The above stated order dated 31.01.1997 passed in Execution Case No. 01 of 1996 was challenged by the decree holders/petitioners before this court by filing Civil Revision No. 537 of 1997 which was dismissed by this court vide order dated 27.08.1997 and while dismissing the aforesaid Civil Revision No. 537 of 1997, this court observed in order dated 27.08.1997 that the decree passed in Title Suit No. 78 of 1993/ 16 of 1994 has to be read as one for confirmation of possession alone and the court further observed in the aforesaid order as follows:-

“In a declaratory suit for title it is almost customary for the plaintiff to seek confirmation of possession and in the alternative, seek recovery of possession if he is found to have been dispossessed. In case of dispossession he has to establish the fact and the court is supposed to record a finding and pass a decree. If the plaintiffs in the



present case claimed reliefs in that form but did not lead evidence nor the court recorded any such finding, it would be wrong to expect that the executing court would deliver possession of the property in purported execution of the decree. In these premises, the court below did not commit any error in rejecting the prayer for delivery of possession.”

4. After disposal of S.L.P. (civil) No. 16789 of 2009, the decree holders/petitioners again filed Execution Case No. 08 of 2009 and in the aforesaid execution case, the judgment debtors/opposite parties filed objection raising this point that the decree passed in Title Suit No. 78 of 1993/ 16 of 1994 was barred by law of limitation and was not liable to be executed and also raised this point that order passed in Civil Revision No. 537 of 1997 has been concealed by the decree holders/petitioners and furthermore, they raised objection that the decree passed in Title Suit No. 78 of 1993/ 16 of 1994 does not contain relief of recovery of possession as observed by this court in Civil Revision No. 537 of 1997 and, therefore, the Execution Case No. 08 of 2009 was not maintainable. The court below having heard the parties on execution petition as well as its objection passed detailed order on 05.07.2010 rejecting the objection of the judgment debtors/opposite parties. the judgment debtors/opposite parties



challenged the order dated 05.07.2010 before this court by filing Civil Revision No. 753 of 2010 which was dismissed by a co-ordinate Bench of this court vide order dated 24.07.2012 giving liberty to the executing court to deal with the issue of dispossession of decree holders/petitioners and accordingly, confirmed the order dated 05.07.2010. However, after receipt of above stated order dated 24.07.2012 passed in Civil Revision No. 753 of 2010 in the court below, the judgment debtors/opposite parties again filed objection before the court below mentioning therein that the decree holders/petitioners failed to mention the factum of dispossession from the suit land during pendency of the suit and, therefore, the decree passed in Title Suit No. 78 of 1993/ 16 of 1994 cannot be executed because a co-ordinate Bench of this court has already observed in Civil Revision No. 537 of 1997 that the decree passed in Title Suit No. 78 of 1993/ 16 of 1994 shall be treated as a decree only for confirmation of possession. the learned court below having considered the submissions of the parties again dismissed the Execution Case No. 08 of 2009 passing impugned order dated 29.05.2013 holding that the decree holders/plaintiffs failed to plead the date of dispossession from the suit land either during pendency of Title Suit No. 78 of 1993/ 16 of 1994 or in the execution petition. Being dissatisfied with the aforesaid order dated 29.05.2013, the



decree holders/petitioners have preferred this revision petition before this court.

5. Learned counsel appearing for the decree holders/petitioners assailed the impugned order arguing that admittedly, the learned court below passing impugned order dated 05.07.2010 had rejected the objections raised by the judgment debtors/opposite parties and the order dated 05.07.2010 of the court below was confirmed up to this court in Civil Revision No. 753 of 2010 but the learned court below without recalling its previous order dated 05.07.2010 passed the impugned order which is not in accordance with law rather it is amount to contempt of this court. He further submitted that there was no necessity to give specific date of dispossession and it was sufficient to plead before the execution court that the decree holders/petitioners had been dispossessed from the suit land and it has specifically been mentioned in execution petition that decree holders/petitioners had been dispossessed from the suit land and, therefore, it was the duty of the executing court to follow the direction given in the decree passed in Title Suit No. 78 of 1993/16 of 1994. He submitted that there is no distinction between confirmation of possession as well as recovery of possession. In support of his above stated contention he referred the decision of **Dwarka Prosad vs. Krishna Chandra and others** reported in



A.I.R. 1939 Patna 254 but in my view, the aforesaid decision is not applicable in the facts of the present case because the aforesaid decision relates to the matter of valuation of a suit and in that background the court observed that for valuation of the suit, there is no distinction between recovery of possession and confirmation of possession. In my view, the above stated both terms have separate meaning because the confirmation of possession is said when a person is in possession of any property and seeks helps of the court for confirmation of his possession regarding that property whereas recovery of possession means when a person is dispossessed from a property and he seeks help of the court for restoration of his possession over the suit property.

6. Learned counsel appearing for the decree holders/petitioners further submitted that execution court has no jurisdiction to go beyond the decree and, therefore, in the present case, the learned court below had no right to go beyond the decree which is sought to be executed in Execution Case No. 08 of 2009. He submitted that admittedly, the trial court in Title Suit No. 78 of 1993/16 of 1994 passed decree of title, confirmation of possession as well as recovery of possession if the decree holders/petitioners are found dispossessed from the suit land and the aforesaid decree was confirmed up to the Hon'ble Apex Court and therefore, the executing



court was bound to accept this fact that the decree holders/petitioners were dispossessed from the suit property during pendency of the lis. In support of his contention, he referred decision reported in **A.I.R. 1972 SC 1371** in which at para-19 it has been held by the Apex Court as follows:-

“19. It is true that an executing court cannot go behind the decree under execution. But that does not mean that it has no duty to find out the true effect of that decree. For construing a decree it can and in appropriate cases, it ought to take into consideration the pleadings as well as the proceedings leading upto the decree. In order to find out the meaning of the words employed in a decree the Court, often has to ascertain the circumstances under which those words came to be used. That is the plain duty of the execution Court and if that Court fails to discharge that duty it has plainly failed to exercise the jurisdiction vested in it.”

7. Learned counsel appearing for the decree holders/petitioners further submitted that moreover, in the case of **Biswanath vs. Smt. Uttara Bewa and others** reported in A.I.R. 1988 Orissa 9, it has been held by the Hon'ble Orissa High Court that even if suit for declaration of title, confirmation of possession and in alternative for recovery of possession is decreed and the decree is



declaring plaintiff's title and possession only, then in that circumstance also, the decree can be executed for delivery of possession.

8. Learned counsel for decree holders/petitioners further submitted that in the present case, admittedly, the judgment debtors/opposite parties filed first objection on 16.03.2010 and their objection was turned down by the executing court passing order dated 05.07.2010 which was confirmed up to this court and, therefore, they had no right to file second objection in the execution proceeding as only one objection can be filed in execution proceeding under Order 21 Rule 23 of the C.P.C. but in the present case, the learned executing court entertained the second objection of the judgment debtors/opposite parties though vide order dated 21.08.2010 the executing court had already allowed the petition filed on behalf of decree holders/petitioners under Order 21 Rule 35 of the C.P.C. and had directed the decree holders/petitioners to deposit Rs. 300/- as nazir fee and had also ordered for issuance of writ but even after passing that order the learned executing court entertained the objection filed by the judgment debtors/opposite parties on 17.09.2012 and on the basis of aforesaid objection passed the impugned order which is not in accordance with law and, therefore, the impugned order passed by the court below is liable to be set



aside.

9. On the other hand, learned counsel appearing for the judgment debtors/opposite parties refuted the above stated submissions arguing that no doubt, the trial court decreed the Title Suit No. 78 of 1993/ 16 of 1994 which had been filed by the decree holders/petitioners for declaration of right, title and confirmation of possession and in alternate recovery of possession of the suit property but admittedly, after passing of decree in Title Suit No. 78 of 1993/ 16 of 1994 and during pendency of F.A. No. 02 of 1996/13 of 1998, the decree holders/petitioners filed Execution Case No. 01 of 1996 for recovery of possession of the suit property but the aforesaid Execution Case No. 01 of 1996 was dismissed by the executing court on the ground of pendency of Title Appeal No. 02 of 1996/ 13 of 1998 as well as on this ground that date of dispossession from the suit land had not been disclosed in the execution case. He further submitted that aforesaid order passed in Execution Case No. 01 of 1996 was challenged before this court by the decree holders/petitioners in the Civil Revision No. 537 of 1997 and a co-ordinate Bench of this court vide order dated 27.08.1997 clarified the controversy holding that decree passed in Title Suit No. 78 of 1993/ 16 of 1994 shall be treated as one for confirmation of possession alone and, therefore, in the aforesaid Civil Revision No. 537 of 1997



a co-ordinate bench of this court clearly held that there was no decree for recovery of possession. The decree holders/petitioners failed to plead before the court regarding the factum of their dispossession from the suit land. He further submitted that however, in the aforesaid Civil Revision No. 537 of 1997 this court observed that the decree holders/petitioners may file a fresh suit for recovery of possession but the decree holders/petitioners did not file any fresh suit rather filed fresh Execution Case No. 08 of 2009 concealing the above stated facts. He further submitted that order dated 27.08.1997 passed in Civil Revision No. 537 of 1997 has not been challenged and the aforesaid order has already attained its finality. Therefore, the decree holders/petitioners have no right to say that in Title Suit No. 78 of 1993/ 16 of 1994 a decree for recovery of possession had also been passed.

10. Learned counsel for the judgment debtors/opposite parties further submitted that no doubt, the learned executing court rejected the objection regarding limitation of Execution Case No. 08 of 2009 passing order dated 05.07.2010 which was challenged before this court in Civil Revision No. 753 of 2010 and a co-ordinate Bench of this court vide order dated 24.07.2012 passed in Civil Revision No. 753 of 2010 granted liberty to executing court to see the factum of possession and dispossession of the decree holders/petitioners in



Execution Case No. 08 of 2009 and in the light of aforesaid direction, the executing court passed the impugned order when the executing court found that decree holders/petitioners failed to prove this fact that they were dispossessed from the suit property during pendency of the lis and, therefore, in the aforesaid circumstance, there is no illegality, irregularity or impropriety into the impugned order. He further submitted that it has specifically been pleaded by the decree holders/petitioners before this court that this court may presume that the decree holders/petitioners have been dispossessed from the suit property after disposal of 2nd Appeal No. 130 of 2003 but even if it assumed that decree holders/petitioners were dispossessed after disposal of 2nd Appeal No. 130 of 2003, then also, the Execution Case No. 08 of 2009 is not maintainable because the aforesaid fact clearly demonstrates that the decree holders/petitioners were dispossessed after termination of lis because pendency of special leave petition is not continuation of the suit. In support of his contention, he cited the decision of **Kunhayammed and others vs. State of Kerala and another** reported in A.I.R. 2000 SC 2587 wherein it has been held by the Apex Court that if the Supreme Court exercises its discretionary jurisdiction vested under Article 136 of the Constitution of India, the doctrine of merger does not apply. He further submitted that there is nothing on the entire record to show



that decree holders/petitioners were dispossessed during pendency of the lis and, therefore, even if it is found that they were dispossessed after termination of the lis, they cannot get any relief in the present execution case because it is well settled principle of law that declaratory decree is not an executable decree.

11. Having heard the contentions of both the parties, I went through the record as well as decisions cited on behalf of the parties. It is emerged out from the facts as well as submissions of the parties that main objection of the judgment debtors/opposite parties is that a Co-ordinate Bench of this court in Civil Revision No. 537 of 1997 has already held that the decree passed in Title Suit No. 78 of 1993/ 16 of 1994 shall be treated as a decree only for confirmation of possession. Further objection of judgment debtors/opposite parties is that the decree holders/petitioners have not disclosed the date of their dispossession from the disputed land either before the regular court or before the execution court. Therefore, in view of the aforesaid backdrop, now it has to be seen as to whether the decree passed in Title Suit No. 78 of 1993/ 16 of 1994 is an executable decree or not.

12. It is an admitted position that during pendency of F.A. No. 02 of 1996/ 13 of 1998, the petitioners/decreed holders filed Execution Case No. 01 of 1996 seeking execution of recovery of possession in the light of decree passed in Title Suit No. 78 of 1993/



16 of 1994 but the aforesaid Execution Case No. 01 of 1996 was dismissed by the execution court on the ground of pendency of F.A. No. 02 of 1996/ 13 of 1998 and also on the ground of non pleading of factum of dispossession from the disputed land. It is also an admitted position that the execution court while dismissing Execution Case No. 01 of 1996 gave liberty to petitioners/decreed holders to file fresh execution case after disposal of first appeal. It is also an admitted position that in Civil Revision No. 537 of 1997, the above stated order of the execution court was impugned and in that scenario, this court while exercising revisional jurisdiction gave observation that the decree passed in Title Suit No. 78 of 1993/ 16 of 1994 shall be treated as a decree of confirmation of possession only because in absence of specific finding of dispossession, the decree of recovery of possession could not be executed.

13. It is not in dispute that the finding and judgment of the trial court given in Title Suit No. 78 of 1993/ 16 of 1994 was confirmed up to the Apex Court meaning thereby the decree of recovery of possession was also confirmed up to the Apex Court of this country. It is also not in dispute that F.A. No. 02 of 1996/ 13 of 1998, 2nd Appeal No. 130 of 2003 as well as S.L.P. (civil) No. 16789 of 2009 were disposed of after passing the order dated 27.08.1997 in Civil Revision No. 537 of 1997.



14. It is pertinent to note here that when the objection raised by judgment debtors/opposite parties regarding the maintainability of Execution Case No. 08 of 2009 on the ground of limitation was rejected by the execution court vide order dated 05.07.2010, the aforesaid order was challenged before this court in Civil Revision No. 753 of 2010 and before this court the plea regarding the non execution of decree of recovery of possession in the light of order passed in Civil Revision No. 537 of 1997 was raised but this court vide order dated 24.07.2012 turned down the aforesaid objection though liberty was granted to execution court to examine the factum of possession and dispossession and thereafter, an objection was filed by the judgment debtors/opposite parties raising maintainability of the Execution Case No. 08 of 2009 on the ground of observations given in Civil Revision No. 537 of 1997 but in my view, when the execution court had already turned down the objection raised by the judgment debtors/opposite parties vide order dated 05.07.2010 and had directed for issuance of writ to execute the decree, there was no occasion before the execution court to entertain objection on behalf of the judgment debtors/opposite parties again. Moreover, when this court vide order dated 24.07.2012 passed in Civil Revision No. 753 of 2010 had already held that the order passed in Civil Revision No. 537 of 1997 shall not operate as res judicata,



the execution court committed error in overlooking the aforesaid observation of this court given in Civil Revision No. 753 of 2010. It is well settled principle of law that execution court cannot go beyond the decree and the execution court has to follow the directions/orders given in the decree. No doubt, the execution court can interpret the decree but admittedly, the execution court has no right to modify or correct the decree. In Civil Revision No. 537 of 1997, this court appears to have modified the decree because the decree passed in the suit specifically contained the relief of recovery of possession and the aforesaid decree was confirmed up to the Apex Court of this country.

15. It has been argued that the petitioners/decreed holders had never pleaded either before regular court or before execution court regarding their dispossession from the suit property rather in their supplementary affidavit, they have accepted that they were dispossessed from the suit property after dismissal of second appeal but in my view, the aforesaid contention is liable to be rejected because it is an admitted position that during pendency of first appeal, the petitioners/decreed holders filed Execution Case No. 01 of 1996 which goes to show that at the time of filing of Execution Case No. 01 of 1996, the petitioners/decreed holders claimed that they had been dispossessed from the suit property.

16. It is well known fact that it is common practice in



civil suits to seek relief for declaration of right, title and confirmation of possession and in alternate, recovery of possession, if the plaintiff is found dispossessed during pendency of the suit. Therefore, it is not necessary to give specific date of dispossession and it is the duty of the court to find out as to whether the plaintiff who is seeking above stated reliefs is in possession of the suit property or not and the court is duty bound to give specific finding regarding the aforesaid fact but in the present case, while disposing of Title Suit No. 78 of 1993/ 16 of 1994, the concerned court did not give any specific finding regarding the dispossession of the petitioners/decreed holders though the decree for recovery of possession was granted. However, it is obvious from the above stated fact that the petitioners/decreed holders filed Execution Case No. 01 of 1996 seeking recovery of possession and, therefore, above stated fact establishes that the plaintiffs/decreed holders were dispossessed during pendency of the lis and, therefore, in my view, there was no necessity to plead specific date of dispossession.

17. In view of the aforesaid facts and circumstances as well as discussions, I am of the opinion that the impugned order cannot sustain in the eye of law. Accordingly, this revision petition is allowed and impugned order dated 29.05.2013 passed by learned Sub Judge-1, Aurangabad in Execution Case No. 08 of 2009 is, hereby,



set aside and the learned execution court is directed to proceed in Execution Case No. 08 of 2009 in accordance with law without any delay.

(Hemant Kumar Srivastava, J)

SHAHZAD/-

AFR/NAFR	A.F.R.
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