

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WP227 No. 2635 of 2009**

- Nasimuddin Ansari, S/o Basiruddin Ansari, aged about 40 years, R/o Lala Lajpat Rai Ward Khaparganj, Bilaspur, Tahsil and District – Bilaspur (C.G.)

---- Petitioner**Versus**

- Navyuvak Kaanya Kubj Vikas Samiti, Bilaspur, Registration No. 2140, Through – President, Thakur Prasad Dixit, S/o Kalika Prasad Dixit, aged about 80 years, R/o Sadar Bazar, Bilaspur, Tahsil and District – Bilaspur (C.G.)
- Nasim Khan, S/o Basir Khan, aged about 30 years, R/o Khaparganj, Bilaspur, Tahsil and District – Bilaspur (C.G.)

---- Respondents

For Petitioner	:	Shri M.A. Latif Rahman, Advocate
For Respondent No.1	:	Shri Sourabh Sharma, Advocate

Hon'ble Shri Justice Goutam Bhaduri**Order on Board****25.06.2018**

Heard.

1. Present petition is against the order dated 01.05.2009, whereby an application preferred under Section 47 read with Order 21 Rule 97 and Section 151 of the CPC was dismissed.
2. The brief facts of this case are that a decree for possession was passed against one Nasim Khan, Respondent No.2 herein, on a civil suit filed by Respondent No.1, Navyuvak Kaanya Kubj Vikas Samiti, Bilaspur. When the decree was put to execution, an objection was filed by the Petitioner under Section 47 read with Order 21 Rule 97 and Section 151 of the CPC. It was alleged that Petitioner is in possession of the suit premises and by describing one person, namely, Nasim Khan, who was non-existent, the decree was obtained by fraud. It was stated that the suit house was actually bequeathed in favour of the Petitioner/Nasimuddin Ansari by the erstwhile owner, namely, Asha Shukla and

they are in possession thereof. It was stated that the application filed under Section 47 read with Order 21 Rule 97 and Section 151 of the CPC was decided without any enquiry, therefore, the present petition. It is further submitted that the decree which was obtained against a person named Nasim Khan is completely illegal as person named Nasim Khan never existed. It is further submitted that after filing of this petition, when the notices were issued and the report came that Nasim Khan died, though time was sought for to delete the name of Nasim Khan, but subsequently having known that Nasim Khan never existed, the application to recall the order dated 11.09.2013 was filed. It is submitted that under the facts of this case, since the decree was obtained by showing a false person as defendant, though the Petitioner is in actual possession of the suit house, the rejection of the application under Section 47 read with Order 21 Rule 97 and Section 151 of the CPC suffers with illegality.

3. Per contra, learned counsel for the Respondent No.1 opposes the same. It is stated that the regular appeal was preferred by the Petitioner against the judgment and decree dated 30.11.2005, therefore, two parallel proceedings cannot be continued. It is further stated that though the right to the property was claimed on the basis of a will, but the said will was not placed before the Court below. It is stated that earlier the Petitioner claimed to be a tenant, however, no document was placed to prove the same. He submits that the order under challenge was passed by virtue of Order 21 Rule 97, therefore, any order of dismissal thereof, the appeal should have been preferred. It is also submitted that an appeal having been preferred against the original judgment and decree, two simultaneous proceedings could not have been brought and the petition has no merit and is liable to be dismissed.
4. Perused the documents filed along with the petition. The documents show that the decree of eviction was passed by the Court of 9th Civil Judge, Class-II, Bilaspur in Civil Suit No.120-A/2004 on 30.11.2005. In the said judgment it is

recorded that by registered gift deed dated 01.01.1992, the property was donated in the name of society, namely, Navyuvak Kaanya Kubj Vikas Samiti, Bilaspur, which is a registered society. The decree further purports that a possession decree was passed and it was also directed that defendant therein would be liable to pay an amount of Rs.250/- per month as damages till the vacant possession is delivered to the decree holder. When the decree was put for execution, initially an application was preferred by the Petitioner under Order 21 Rule 26 read with Section 151 of the CPC. The said application was dismissed by the Executing Court by an order dated 25.03.2009. The reading of the order of the Court below would show that it was claimed that the original owner has bequeathed entire property by way of a will in favour of the Petitioner and the donor has died on 26.03.2008. The Executing Court, after examining all the documents and the revenue record, dismissed the contentions of the Petitioner on the ground that the different names were recorded in the revenue record and copy of will not produced before the Executing Court. It was further found that the decree was passed on the basis of the gift deed given in favour of Respondent No.1 herein i.e. Navyuvak Kaanya Kubj Vikas Samiti, Bilaspur and directed for issuance of the decree for the possession.

5. Thereafter, again an application under Section 47 read with Order 21 Rule 97 and Section 151 of the CPC was preferred. The said application was dismissed by the trial Court by an order dated 01.05.2009. While adjudicating the application, the Court below observed that no document was placed on record to draw inference that the property was bequeathed in favour of the Petitioner by the original owner. Perusal of record would show that in the entire documents though the petition is pending since 2009 even copy of alleged will was not placed and only bald submissions were made. Thus, if the entire proceedings are considered, it would show that the Petitioner being a third party was claiming his right apprehending dispossession. As is observed herein before

though the right was claimed on the basis of a will, but the will was never placed before the Executing Court. Under these circumstances, no scope was given to the Executing Court even to consider the substratum of the claim made by the Petitioner so as to go into further enquiry to accept submission of Petitioner. More so, as has been brought to the notice that an appeal was preferred by the Petitioner in respect of the judgment and original decree dated 30.11.2005, it appears that two proceedings were simultaneously drawn by the Petitioner, thereby efforts were made to take chance.

6. In the facts of this case, Order 21 Rule 35 CPC, which touches upon the decree of immovable property and Section 51 CPC which describes power of the executing Court to enforce the execution read with Section 74 CPC which deals with the procedure when the resistance is offered in execution of the decree, would be relevant in this case which reads as under:-

“Order 21 Rule 35. Decree for immovable property.- (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree holder in possession.

Section 51. Powers of court to enforce execution.- Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree holder, order execution of the decree—

(a) by delivery of any property specifically decreed;

(b) by attachment and sale or by sale without attachment of any property;

(c) by arrest and detention in prison for such period not exceeding the period specified in section 58, where arrest and detention is permissible under that section;

(d) by appointing a receiver; or

(e) in such other manner as the nature of the relief granted may require:

Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons recorded in writing, is satisfied—

(a) that the judgment debtor, with the object or effect of obstructing or delaying the execution of the decree,—

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or

(b) that the judgment debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment debtor was bound in a fiduciary capacity to account.

74. Resistance to execution.— Where the Court is satisfied that the holder of a decree for the possession of immovable property or that the purchaser of immovable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.”

7. Reading of the aforesaid provision would show that the executing Court has all the power to deliver the possession of the decree by removing any person bound by the decree who refuses to vacate the property. Section 51 speaks about the powers of Court to enforcement which also includes that the decree may be executed by the arrest and detention in prison and Section 74 specifically speaks about when the resistance is offered, the person who resists may be detained in the civil prison.

8. The Supreme Court in the matter on **Narayan Dutt Tiwari Vs. Rohit Shekhar and Another {(2012) 12 SCC 554}** has laid down the principle that the difficulty in implementation of an order passed by the court, howsoever grave its effect may be, is no answer for its non-implementation. It was further held that a litigant who has secured an order from the Court is entitled to full benefit thereof and the Court is entitled to resort to law enforcement machinery to see that its orders are obeyed.
9. The Supreme Court in **Satyawati Vs. Rajinder Sing and Another {(2013) 9 SCC 491}** while dealing the appeal for execution deprecated the unreasonable delay for the reason that the decree-holder if is unable to enjoy the fruits, the entire effort of successful litigant would be in vain. The Supreme Court has thus observed as under in para 12 to 17, which reads as under:-

“12. It is really agonizing to learn that the appellant-decree-holder is unable to enjoy the fruits of her success even today i.e. in 2013 though the appellant- plaintiff had finally succeeded in January, 1996. As stated hereinabove, the Privy Council in the case of *The General Manager of the Raj Durbhunga vs. Coomar Ramaput Sing* had observed that the difficulties of a litigant in India begin when he has obtained a Decree. Even in 1925, while quoting the aforesaid judgment of the Privy Council in Kuer Jang Bahadur vs. Bank of Upper India Ltd., the Court was constrained to observe that:

“Courts in India have to be careful to see that process of the Court and law of procedure are not abused by the judgment-debtors in such a way as to make Courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights.”

13. In spite of the aforesaid observation made in 1925, this Court was again constrained to observe in Babu Lal vs. Hazari Lal Kishori Lal in para 29 that:

“29. Procedure is meant to advance the cause of justice and not to retard it. The difficulty of the decree holder starts in getting possession in pursuance of the decree obtained by him. The judgment debtor tries to thwart the execution by all possible objections”

14. This Court, again in Marshall Sons & Co. (I) Ltd. vs. Sahi Oretrans (P) Ltd. was constrained to observe in para 4 of the said judgment that:

“4it appears to us, prima facie, that a decree in favour of the appellant is not being executed for some reason or the other, we do not think it proper at this stage to direct the respondent to deliver the possession to the appellant since the suit filed by the respondent is still pending. It is true that proceedings are dragged for a long time on one count or the other and on occasion, become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Because of the delay, unscrupulous parties to the proceedings take undue advantage and person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also a known fact that after obtaining a decree for possession of immovable property, its execution takes a long time”

15. Once again in Shub Karan Bubna vs. Sita Saran Bubna at para 27 this Court observed as under :

“27. In the present system, when preliminary decree for partition is passed, there is no guarantee that the plaintiff will see the fruits of the decree. The proverbial observation by the Privy Council is that the difficulties of a litigant begin when he obtains a decree. It is necessary to remember that success in a suit means nothing to a party unless he gets the relief. Therefore, to be really meaningful and efficient, the scheme of the Code should enable a party not only to get a decree quickly, but also to get the relief quickly. This requires a conceptual change regarding civil litigation, so that the emphasis is not only on disposal of suits, but also on securing relief to the litigant.”

16. As stated by us hereinabove, the position has not been improved till today. We strongly feel that there should not be unreasonable delay in execution of a decree because if the decree holder is unable to enjoy the fruits of his success by getting the decree executed, the entire effort of successful litigant would be in vain.

17. We are sure that the Executing Court will do the needful at an early date so as to see that the long drawn litigation which was decided in favour of the appellant is finally concluded and the appellant-plaintiff gets effective justice.”

10. In the instant case, it appears that the decree though was passed in the year 2005, but still the fruits of the decree remain to be enjoyed by the decree-holder. When the decree was put to execution, the Petitioner initially came out with the fact that the property has been bequeathed in their favour. Neither any document was placed before the Court below to *prima-facie* ponder upon such

submission nor any other substantial relevant document was placed. The objection was made like a passerby to go for a toss claiming their right. The Petitioner if was so agile of his right that when a proprietary right is claimed on the basis of the will then minimum requirement was expected that the copy of will should have been placed before the Court below. Therefore, on mere saying the property was bequeathed in favour of Petitioner, the same cannot be accepted as a gospel truth. In order to involved the provisions of Section 47 and Order 21 Rule 97 of CPC it was the duty of Petitioner to *prima-facie* establish his right on the basis of will be at least producing the same. It appears that Petitioner was successful to arrest the execution of the decree for reasonably long time only on submission without any iota of primary facts in his favour.

11. In a result, taking into totality of the facts, I am of the considered view that dismissal of the application preferred by the Petitioner under Section 47 read with Order 21 Rule 97 of the CPC cannot be faulted with as no *prima-facie* case was placed before the Court below so as to shelve the fruits of the decree in exercise of the power under Article 227 of the Constitution of India. The petition has no merit and is accordingly dismissed.

Sd/-
(Goutam Bhaduri)
Judge