

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved for orders on :17/08/2020

Order passed on :12 /10/2020

WP227 No. 388 of 2018

- Shatrughan Pandey S/o Shri Parasnath Pandey, Aged About 66 Years, R/o Pachpedhi Naka, Raipur Tehsil and District Raipur Chhattisgarh., District : Raipur, Chhattisgarh

---- Petitioner

Versus

Chandeshwar Singh Thakur (Died and deleted) (wrongly mentioned as Chandrashekhar in the impugned order), through his legal heirs:-

1. Smt. Rajkumari Singh Thakur W/o Chandeshwar Thakur (age not mentioned in the impugned order) R/o in front of Aman Atta Chakki, Navjeevan Society Road, Pachpedhi Naka, Raipur, Tehsil and District Raipur Chhattisgarh., District : Raipur, Chhattisgarh
2. Manish Singh Thakur S/o Chandeshwar Thakur (age not mentioned in the impugned order) R/o in front of Aman Atta Chakki, Navjeevan Society Road, Pachpedhi Naka, Raipur, Tehsil and District Raipur Chhattisgarh., District : Raipur, Chhattisgarh
3. Vikas Singh Thakur S/o Chandeshwar Thakur, (age not mentioned in the impugned order) R/o in front of Aman Atta Chakki, Navjeevan Society Road, Pachpedhi Naka, Raipur Tehsil and District Raipur Chhattisgarh., District : Raipur, Chhattisgarh
4. Bhawan Ji Saah S/o Heeraji Bhai, Aged About 82 Years, R/o Jalvihar Colony, Raipur Tehsil and District Raipur Chhattisgarh., District : Raipur, Chhattisgarh (Decree-Holder)

---- Respondents

WP227 No. 117 of 2019

- Bhawanji Shah (wrongly mentioned in impugned order as Bhawanji Sahu), S/o Heerji Bhai Shah (wrongly mentioned in impugned order as Heerabhai Sahu), Aged About 83 Years, R/o 54, Jalvihar Colony, Raipur, Tehsil and District- Raipur, Chhattisgarh.....(Decree Holder), District : Raipur, Chhattisgarh

---- Petitioner

Versus

1. Smt. Rajkumari Singh Thakur W/o Late Chndeshwar Thakur (wrongly mentioned in impugned order as Chandrashekhar Singh) (age not mentioned in the impugned order), R/o in front of Aman Atta Chakki, Navjeenan Society Road, Pachpedhi Naka, Raipur, Tehsil and District- Raipur, Chhattisgarh., District : Raipur, Chhattisgarh
2. Manish Singh Thakur S/o Chandeshwar Thakur (wrongly mentioned in impugned order as Chandrashekhar Singh) (age not mentioned in the impugned order), R/o in front of Aman Atta Chakki, Navjeenan Society Road, Pachpedhi Naka, Raipur, Tehsil and District- Raipur, Chhattisgarh., District : Raipur, Chhattisgarh
3. Vikas Singh Thakur S/o Chandeshwar Thakur (wrongly mentioned in

impugned order as Chandrashekhar Singh) (age not mentioned in the impugned order), R/o in front of Aman Atta Chakki, Navjeenan Society Road, Pachpedhi Naka, Raipur, Tehsil and District- Raipur, Chhattisgarh.....(Judgment Debtors), District : Raipur, Chhattisgarh

---Respondents

For Petitioner – Shri Ankur Agrawal, Advocate (in WP227 No.388/2018),
Shri Ashish Surana, Advocate (in WP227 No.117/2019).
For Respondents 1 to 3 (in WP227 No.388/2018) – Shri Manoj Paranjpe,
Advocate.
For Respondent No.4 (in WP227 No.388/2018) – Shri Ashish Surana,
Advocate.
For Respondents 1 and 2 (in WP227 No.117/2019) – Shri R.K. Gupta,
Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant
CAV Order

12-10-2020

1. Both the petitions brought under Article 227 of the Constitution of India are challenging the order dated 13-03-2018 passed by the Court of Fourth Civil Judge Class I Raipur in execution Case No. 24A/1989. Petitioner Shatrughan Pandey in WP227 No.388/2018 has challenged the legality of the impugned order and petitioner Bhawanji Shah in WP227 No.117/2019 has also challenged the same supporting the case of petitioner Sharughan Pandey.

2. Civil Suit No.24A/1989 was contested between Bhawanji Shah S/o Heerji Bhai Shah (who is petitioner in WP227 No.117/2019 and respondent No.4 in WP227 No.388/2018) and defendant Chandeshwar Singh Thakur and others who are respondents in both the petitions. After completion of the trial the suit for possession was decreed in favour of the plaintiff Bhawanji Shah on 13-03-1990 granting relief of vacant possession of the disputed land along with cost of the suit. After the decree became finality, an execution case No.24A/1989 was filed before the execution Court.

According to the case of petitioner Sharughan Pandey (petitioner in WP227 No.388/2018) the said property was purchased by him from the decree holder by a sale deed dated 23-03-1993. The judgment debtor filed an

application under Order 21 Rule 23 read with Section 49 of the CPC making a prayer that the decree holder has sold out the property and he himself is not prosecuting the execution case, on this basis execution proceeding be terminated. Petitioner Sharughan Pandey (petitioner in WP227 No.388/2018) filed an application under Section 130 of the Transfer of Property Act read with Section 49 of the CPC praying that by virtue of purchase of suit property on 23-03-1993, he has become assignee and permission be granted to amend the cause title of the execution application showing his name as assignee decree holder. Both the applications were contested.

The learned execution Court has passed the order dated 13-03-2018 and held that the decree holder himself was not prosecuting the execution case and the same was being prosecuted at the instruction of petitioner Sharughan Pandey who had no authority. It was also held that as the original decree holder has dissociated from this execution proceeding, therefore, the execution has also become time barred, on this basis the execution proceeding was dismissed.

3. It is submitted by learned counsel for the petitioners in both the cases that the execution application was filed on 03-07-1993 by the original decree holder. The proceeding in the execution case could not go on as expected because record went missing, because of which a number of dates were fixed for the production of that record. During pendency of this proceeding one of the judgment debtors expired and then time was spent in the procedure of bringing legal representatives of that judgment debtor in record. It is submitted that the impugned order is totally perverse and against the provisions of law.

It is submitted that according to the provisions under Order 3 Rule 4 of the CPC, a pleader can be appointed by a party itself or by recognized agent of that party and any such authorization or appointment shall remain in force until determined with the leave of the Court by a document in writing signed by the

client or the pleader, as the case may be. In this case no such thing has been done by the decree holder to disengage the Advocate appointed by him, therefore, the observation of the Court below in the impugned order that admission made by the counsel appearing that the decree holder himself is not prosecuting the execution case would not be a reason to conclude that the counsel appointed was disengaged by the decree holder. The appointment of the Advocate made by the decree holder Bawanji Shah is still continuing.

Reliance has been placed on the judgment of Hon'ble the Supreme Court in the matter of **Government of Orissa Vs. Ashok Transport Agency and others**, (2005) 1 SCC 536, **Dhurandhar Prasad Singh Vs. Jai Prakash University and others**, (2001) 6 SCC 534, **Chardra bai (dead) through legal representatives Vs. Khandalwal Vipra Vidyalaya Samiti and others**, (2016) 12 SCC 534.

Reliance has also been placed on the judgment delivered by Rajasthan High Court in the matter of **Smt. Rama and others Vs. Magan Bai and others**, 1997 SCC OnLine Raj 452 and on the judgment of Gauhati High Court in the matter of **Dimbeswar Chaliha Vs. Oil & Natural Gas Commission and another**, 2003 SCC OnLine Gau 75.

4. Learned counsel for the respondents in both the cases opposed the submissions made by learned counsel for the petitioners in both the cases and submits that after passing of decree on 13-03-1990 the suit property was sold by decree holder to petitioner Sharughan Pandey on 23-03-1993. The decree holder was careless. It is submitted that neither the decree holder nor the transferee of the property ever served a notice upon the respondents/judgment debtors regarding the transfer of the property made by the decree holder in favour of the petitioner Sharughan Pandey which is required under Order 21 Rule 16 of the CPC. It is submitted that the procedure as provided under the Provisions of Order 21 Rule 16 of the CPC was not at all followed and no fresh

application was filed by the assignee of the decree holder, therefore, execution application filed by the decree holder which was pending before the execution Court could not have been prosecuted by the assignee, therefore, the same was not at all maintainable. The learned execution Court has amply mentioned the reasons in the impugned order, therefore, there is no need of interference in that order and no need to exercise the supervisory jurisdiction of this Court under Article 227 of the Constitution of India. Hence, prayer has been made to dismiss both the petitions.

On behalf of the respondents reliance has been placed on the judgments of M.P. High Court in the matter of **Ramkunwarbai Vs. Motiram and others**, 1967 MPLJ 231, **Laxminarayan Ramchand Mahajan Vs. Bhera Sitaram Deswali**, 1962 AIR(MP) 379 and on the judgment of Chhattisgarh High Court in the matter of **Ahmed Mansuri Vs. Nandu Sao and others**, 2007 (2) Cg LJ 379.

5. In reply it is submitted by learned counsel for the petitioners in both the cases that the application was filed by petitioner Sharughan Pandey in capacity of assignee of the decree holder on 27-11-2017 under the provision of Section 49 of the CPC and Section 130 of the Transfer of Property Act, praying for his transposition as decree holder in the execution case. Therefore, it is not a case in which the assignee of the decree was negligent. Hence, it is prayed that the impugned order is unsustainable which may be set aside and relief be granted to the petitioners.

6. Considered on the submissions made by learned counsel from both the sides. Perused all the documents present in both the petitions and also considered on the facts of the execution case which has been put to question in both these writ petitions.

7. The facts of the execution case are very clear to this extent that the decree was drawn in favour of the decree holder Bhawanji Shah in Civil Suit

No.24A/1989 on 13-03-1990. It also appears to be undisputed that the decree has become final as there appears to be no challenge made or pending in any superior Court. The application for execution was originally filed by the decree holder Bhawanji Shah and the same has remained pending in the execution Court without any progress. Copy of the order sheets of the execution proceeding which has been filed in both the petitions starts from date 10-02-2000. On perusal of these order sheets, it would be seen that the execution case was pending without any progress and the dates were being fixed for production of original record. On 06-08-2016 the execution Court ordered for issuance of possession warrant. Then a number of dates were fixed for execution of the same. On 01-02-2017 an application was filed on behalf of the decree holder praying for substituting legal representatives of defendant Chandeshwar Singh Thakur, which was allowed and then notice was issued. Last order sheet in the copy filed is dated 04-04-2017. The filing of application by petitioner Sharughan Pandey under Section 49 of the CPC read with Section 130 of the Transfer of Property Act and the filing of application by the respondents under Order 21 Rule 23 read with Section 49 of the CPC both are subsequent events on which the impugned order has been passed.

At present, the question raised is regarding the entitlement of Shatrughan Pandey to be transposed as decree holder in the execution application filed by the original decree holder. Section 49 of the CPC defines that every transferee of a decree shall hold the same authority subject to the equities (if any) which the judgment debtor might have enforced against the original decree-holder.

Order 21 Rule 16 of the CPC reads as under:-

“16. Application for execution by transferee of decree. – Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree

may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder:

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution:

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others."

8. In the case of **Chardra bai (dead) through legal representatives Vs. Khandalwal Vipra Vidyalaya Samiti and others** (supra) Hon'ble the Supreme Court has observed that Full Bench of Patna High Court has held in the case of *Bajinath Ram v. Tunkowati Kuer*, AIR 1962 Pat 285, that a party on whom the interest of the deceased plaintiff or defendant devolves is not entitled to continue the suit or appeal as a matter of right, it is essential to obtain the leave of the Court and granting of leave is within the discretion of the Court. In this case the decree holder has not expired, but he has transacted a sale with petitioner Shatrughan Pandey. The law would not operate automatically in favour of petitioner Shatrughan Pandey, unless and until he moves an application to prosecute the execution proceeding before the execution Court. There is clearly no statement or oral submission from the petitioners side that the petitioner Shatrughan Pandey moved any such application before the execution Court prior to the application filed by him on 27-11-2017 under Section 49 of the CPC read with Section 130 of the Transfer of Property Act.

It is a fact admitted by both the parties that the decree holder has sold the disputed property on 23-03-1993 in which petitioner Shatrughan Pandey is the purchaser of the property. No question can be raised by the petitioners in both the cases regarding any ignorance with respect to the pendency of execution proceeding. If it is to be considered that the execution of sale deed by the decree holder amounts to assignment of decree by the operation of law, in that case it was burden of petitioner Shatrughan Pandey, who claims to be

assignee of the decree before the execution Court to have filed an application to continue the execution as decree holder within the period of limitation. The limitation for filing execution application is provided under Article 136 of the schedule of Limitation Act, 1963 and the limitation prescribed is 12 years from the date when the decree or order becomes enforceable. In this particular case, the decree become executable from the date it was passed. It appears that the original decree holder filed the application for execution of decree within time.

Now the question comes is whether petitioner Shatrughan Pandey will have the same entitlement as the original decree holder to continue with the execution case or that his entitlement shall start from the date the assignment was made in his favour. This question has a simple answer that petitioner/applicant Shatrughan Pandey acquired the entitlement on basis of the sale deed that was executed on 23-03-1993, therefore, limitation that shall be applicable for petitioner Shatrughan Pandey has to be computed from this date. It is not at all disputed that the application was filed in the year 2017 after sufficient long time and long after 12 years limitation from the date he acquired entitlement to execute the decree as assignee.

Reliance of the petitioners side on the matter of **Government of Orissa Vs. Ashok Transport Agency and others** (supra), **Dhurandhar Prasad Singh Vs. Jai Prakash University and others** (supra) have not specifically dealt with question of limitation with respect to execution proceeding, on the other hand, provisions under Order 22 Rule 10 of the CPC has been discussed which is different from the present case.

In case of **Ramkunwarbai Vs. Motiram and others** (supra) the Division Bench of Madhya Pradesh High Court has observed in para No.14 that:-

“14. It follow starightway that limitation is the one prescribed in the old Article 181, that is, three years from the date of the relevant happening

which here is the death of Mayachndsa. The application made in the Court that passed the decree was out by one month and there was no step in aid. Actually there has been no prayer under Section 5, Limitation Act, nor do we have any doubt that any such prayer would have been turned down. The successors not only had immediate knowledge of Mayachandsa's death but also felt that something had to be done. However, for a long time they would do nothing in the proper Court. Thus the application for leave to proceed with the execution was time barred. Certainly it is a hard case; but the hardship has been brought about by the negligence of the successors. Possibly they had lost the sense of urgency because this execution had been left pending for 27 years; but this cannot be a ground for condensation of the delay.”

Further the proviso to Order 21 Rule 16 very clearly provides that notice of any assignment has to be given to the transferor and to the judgment-debtor and decree shall not be executed until the Court has heard their objections (if any) to such execution.

It is apparently clear that no such notice was ever issued to the transferor that is the decree holder and to the judgment debtors who are respondents in both these cases for the simple reason that no application was filed by petitioner Shatrughan Pandey before the execution Court within limitation and the right if any, that had accrued in favour of petitioner Shatrughan Pandey on the basis of the sale deed of the suit property that has been frustrated by the limitation. Therefore, the question on this point decided by the execution Court that petitioner Shatrughan Pandey has no entitlement to prosecute the execution proceeding does not appear to be erroneous and that needs no interference.

9. Another point that has been raised by the petitioners side is this that the original decree holder Bhawanji Shah has never abandoned the execution

proceeding. The finding of the execution Court is this that subsequent to the execution of sale deed, the decree holder has relinquished the right on property and right to prosecute the execution case. This reasoning given in the impugned order does not appear to be palatable. There is specific provision under Order 3 Rule 4 of the CPC that every appointment of counsel in case will remain in force until determination with the leave of the Court.

In the matter of **Smt. Rama and others Vs. Magan Bai and others** (supra) decided by High Court of Rajasthan High Court and **Dimbeswar Chaliha Vs. Oil & Natural Gas Commission and another** (supra) decided by High Court of Gauhati, have observed the same.

There is no circumstance present in accordance with sub-rule 2 of Rule 4 of Order 3 of the CPC. Neither the decree holder has determined the appointment of pleader with the leave of Court nor the client, that is, the decree holder has died and neither the pleader appointed has died. Therefore, counsel appearing on behalf of the decree holder had authority to continue with the execution proceeding on behalf of the original decree holder even if he was advised and instructed by the assignee.

The objection has been raised by the respondents side that the counsel appearing in the execution case was not one who was appointed by the original decree holder. The learned execution Court has observed in the impugned order that counsel who was appearing from the beginning, has made admission that the decree holder has not given him instruction for the prosecution of execution case, which further confirms that the counsel appearing was appointed by the original decree holder, that is, the petitioner Bhawanji Shah in WP227 No.117/2019. The authorization of appearing counsel was never determined and no other circumstances have occurred to hold that the appointment has terminated. Therefore, I am of this view that the authority of the appearing counsel was continuing to give appearance on behalf of the

original decree holder.

Section 54 of the Transfer of Property Act defines sale of immoveable property which provides that delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property. Section 55 of the Transfer of Property Act also provides in clause (1) (f) that the seller is bound to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits.

The sale deed dated 23-03-1993 is an admitted document, according to which the decree holder Bhawanji Shah transferred the property and the right obtained by him in the decree to petitioner Shatrughan Pandey. It can be concluded that petitioner Shatrughan Pandey has not received the possession of the suit property and at the same time the sale deed executed is not under any question at present, therefore, the duty of the seller of immoveable property to place the buyer in possession lies with decree holder Bhawanji Shah.

The observation of the Court below that the decree holder has relinquished his right on the property and also the right to prosecute the execution proceeding is not a finding based on any law. The petitioner Bhawanji Shah may have transferred the right over his property, but the duty of a transfer under Section 55 of the Transfer of Property Act has not been completed by him, hence, he can insist the decree holder to prosecute the execution case.

The execution case was filed by petitioner Bhawanji Shah within limitation and that had been continuing until it was dismissed by the impugned order. The right and entitlement of petitioner Bhawanji Shah (petitioner in WP227 No.117/2019) is continuing and lawful, therefore, the part of the impugned order by which petitioner Bhawanji Shah is affected is liable to be

quashed. Therefore, exercise of jurisdiction of this Court under Article 227 of the Constitution of India is required in case of WP227 No.117/2019.

10. Resultantly, WP227 No.388 of 2018 filed by petitioner Shatrughan Pandey is dismissed. WP227 No.117 of 2019 filed by petitioner Bhawanji Shah is allowed in part and the operation of the impugned order by which petitioner Bhawanji Shah has been disentitled to prosecute the execution proceeding is quashed and the execution case No.24-A/1989 is restored, which shall now be prosecuted by original decree holder. The execution case has remained pending for so many years since the date the decree was passed, therefore, learned execution Court is directed to take up the matter expeditiously and conclude the proceeding preferably within a period of one year from the date the normal functioning of the Courts are started.

Sd/-

(Rajendra Chandra Singh Samant)
Judge