

06. 01.12.2021
Ct. No.21
A.B.

C.O. 2021 of 2021

M/s Kusum Agency

-Versus-

Gopi Kishna Jhunjunwala & Anr.

(Through Video Conference)

Ms. Manju Agarwal
Mr. Bajrang Manot

...for the Petitioner.

Mr. Aniruddha Chatterjee
Mr. Vikas Baisya
Mr. Saptarshi Kr. Mal

...for the Opposite Parties.

The petitioner/Judgment Debtor being aggrieved by order passed by the Ld. Judge, Presidency Small Causes Court, 3rd Bench, in Misc. Case No. 18 of 2017 arising out of Ejectment Execution Case No. 140 of 2016 on 17.11.2021 has preferred the present revisional application praying for setting aside the impugned order and for stay of the said order.

The brief fact of the case is that Opposite Parties being the landlord/owner of the disputed property filed an Eviction Suit being no. 519 of 2012 against M/s Kusum Agency before the ld. Court below. Such suit was decreed ex parte on 08.09.2016. Then such decree was put in to execution by filling Execution Case No. 140 of

2016 on 08.12.2016. In such execution case the decree holders have filed a petition under Order XXI Rule 97 read with section 151 of the Code of Civil Procedure, 1908 and under Rule 208 of Civil Rules and Orders for execution of the decree with the help of police and which has been registered as Misc. Case No. 18 of 2017. The Ld. Court below by passing the impugned order has been pleased to allow the Misc. Case filed by the decree holder/Opposite Parties.

Now, by filling the present application the petitioner has alleged when the exparte decree of eviction was passed on 08.09.2016, Sampat Mal Surana, the proprietor of M/s Kusum Agency was dead as he died on 17.11.2021. Therefore, decree in question having passed against a dead man is null and void and not executable.

Further, it has been alleged the petitioner was not allowed to adduce any evidence in Misc. Case under Order XXI Rule 97 read with section 151 C.P.C. and Rule 208 of C.R.O filed by Opposite Parties by Ld. Court below and thereby deprived the petitioner the right of being heard.

The description of the suit property given in the schedule of the petition is incorrect. The decree has been obtained by practicing fraud and alleged impugned order suffers from illegality and materials irregularities and liable to be set aside.

Ld. advocate for the petitioner submitted what is stated above at the time of hearing.

On the other hand Ld. Lawyer for the Opposite Parties contended that no revision lies against impugned order passed under Order XXI Rule 97CPC. He submits an order passed under Order XXI Rule 97CPC is considered to be a deemed decree and against which only Appeal lies. He further submits that Order XXI Rule 97 has be to read conjointly with Order XXI Rule 101, Order XXI Rule 98 and Order XXI Rule 103 C.P.C. and order under challenge is deemed to be a decree as laid down by Order XXI Rule 103 C.P.C. and would be appealable before appropriate appellate forum. Thus he contended present Revision is not maintainable and liable to be dismissed.

First, let me see whether Ld. Court below ignoring about the nullity of decree acted illegally in passing the impugned order?

The answer is “NO” in view of well settled principle of law that an executing court cannot go behind the decree. It must take the decree as it stands and execute it according to its terms. It has no power to vary or modify the terms. It has no power to question its legality or correctness. The decree remains executable so long the same is not set aside by a competent court. Any question that does not relate to the execution, discharge or satisfaction of decree is not within the jurisdiction of the

executing court. The decree howsoever may be defective the ld. Court below is bound to execute the decree.

In the instant case, the petitioner could have availed remedies available to it under Order IX Rule 13 to set aside the ex parte decree with the aid of Section 5 of the Limitation Act, in case there was delay in filing such application or could have filed an Appeal against the exparte decree by taking the plea the decree having passed against a dead man the same is null and void and not executable, but I find the petitioner has failed to do so.

Therefore, I do not find any illegality being committed by Ld. Court below for not taking into consideration the plea of nullity taken by the petitioner while considering the petition under Order XXI Rule 97 CPC filed by the Opposite Parties.

Be that as it may, from the impugned order it reflects when the court bailiff had gone to execute the decree in question he was prevented by Samir Sarkar an employee of the Judgement Debtor. And apprehending breach of peace and tranquility in the locality he had returned the writ of possession without executing.

Therefore, the decree holders finding obstruction in execution of the decree by the employee of the petitioner and also apprehending such obstruction later at the time of execution have prayed for police help to get the decree executed by filing an application U/O XXI Rule

97 CPC. Ld. Court below was pleased to allow such prayer of the Decree holders and passed the impugned order.

Now, let me delve on the issue, whether the impugned order is appealable deemed decree or interlocutory order against which revision lies?

On conjointly reading the Provisions of Order XXI Rule 97 with Order XXI Rule 101, Order XXI Rule 98 and Order XXI Rule 103 Civil Procedure Code, it is seen order of removal of obstruction is said to be passed under Order XXI Rule 98 sub rule (2) while determining a question under Order XXI Rule 101 in respect of an application Order XXI Rule 97. Therefore, an order of removal obstruction with the help of police and recovery of possession thereof is a deemed decree under Order XXI Rule 103 CPC. Hence, this court is of view only remedy available to the petitioner/ Judgment debtors is to prefer an Appeal before an appropriate appellate court against such deemed decree and as such no Revision is maintainable against the impugned order.

Further, it has been contended by Ld. Advocate for the petitioner, while determining the concerned Misc. Case Ld. Court below has failed to adhere to the principal of natural justice, by denying the petitioner's right to adduce oral evidence.

Perused certified copy of order sheets of Misc. Case No.18/17 and from where it is seen while granting the

prayer of the present petitioner for stay of the operation of the ex parte decree, the Ld. Court below had directed it to pay occupational charge 25,000/-per month within 15 days of each succeeding English calendar month from the date of decree and in the event of failure stay stands automatically vacated. It further appears from the order dated 31.08.21, that on the failure of the petitioner to comply such order and also on failure of the Judgement Debtor to file written objection and failure to appear before the court, Ld. Court below decided to take up the hearing of the Misc. Case by vacating the conditional stay granted earlier.

From subsequent orders it appear the Judgment Debtor failed to contest the Misc. Case by filling written objection. Then court below proceeded with the hearing of the Misc. Case by permitting the decree holders adduce evidence of witnesses. On the day when the decree holder examined their first witness on 20.09.21, the court below permitted the Judgment Debtor to cross examine the P.W.1 and whose further cross examination was deferred on the prayer of the judgement debtor and in between judgment debtor had taken adjournment twice to complete the cross examination of P.W.1.

It further appears the Judgment Debtor filed Written Objection against the Misc. Case on the day when the cross examination of P.W.1 was completed.

However, the evidence from the side of the Decree holders was completed on 11.11.21 and thereafter the Misc. Case was fixed for hearing argument.

Here, I like to take a pause and want to discuss the procedure which is followed by the trial court. As per procedural law it is the plaintiff/ petitioner who has to adduce evidence of his/her /their witnesses in support of their case and on closure of evidence from the side of the plaintiff/petitioner, automatically defendant/ opposite party will get right to adduce evidence of his/her /their witnesses to prove their defense, unless defendant/ opposite party choose not to adduce evidence.

In the instant case the order dated 11.11.21 reflects the present petitioner had chosen not to adduce any evidence and as such the case was fixed for hearing argument on 17.11.21. The present petitioner on the date of hearing of argument has come up with a petition seeking leave to adduce evidence and which the Id, court below by passing the impugned order rejected the prayer and proceeded to pass order in respect of the Decree holders' petition under Order XXI Rule 97 CPC.

The conduct of the Judgement debtor discussed above reflects that it wants to get the execution of the decree delayed by adopting all kind of tactics. Therefore I hold the allegation brought against the court below for

not adhering the principal of natural justice to be baseless.

Be that as it may, the order under challenge being appealable, the present revision is not maintainable.

Accordingly, C.O. 2021 of 2021 is dismissed with liberty to the petitioner to file an Appeal as per law. If any Appeal is filed the Appellate Court shall decide the same on merits in accordance with law.

Interim order, if any, stands vacated.

There will be no order as to costs.

All parties shall act in terms of the copy of the order downloaded from the official website of this Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Kesang Doma Bhutia, J.)

Later

The learned advocate for the petitioner prays for return of the certified copy of the order of the Court below, which has been annexed along with the revisional application.

The prayer is allowed.

Let the certified copy of the order of the Court below be returned to the learned advocate for the petitioner on filing xerox copy of the same.

(Kesang Doma Bhutia, J.)