

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Reserved on : 23rd November, 2021**
Decided on : 17th December, 2021

+ **CM(M) 1052/2021**

AJIT SINGH

DECEASED THROUGH LRS

..... Petitioner

Through: Mr. Vivek Raja with Mr. Pranshu
Mangla, Advocates.

versus

PADMA BHANDARI

DECEASED THROUGH LRS & ORS.

.... Respondents

Through: Ms. Manjula Gandhi with Mr.
Shivanshu Kumar and Mr. Yash
Agarwal, Advocates.

CORAM:

HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

1. The present petition under Article 227 of the Constitution of India assails the order dated 03rd March, 2021 passed by the Administrative Civil Judge (South), Saket Courts, New Delhi (hereinafter 'Executing Court') in Execution Petition No.350/2017, whereby warrants of possession have been issued qua the portion shown as point 'X' in the site plan (Ex-PW1/A), with a further direction to the bailiff to break up the locks and doors and get the portion, illegally occupied by the petitioners (legal heirs of the judgment debtor/original defendant) behind the portion marked as 'X' in the site plan, vacated from the petitioners.

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2. The counsel for the petitioners as well as counsel appearing on caveat on behalf of the respondents (decree holders/original plaintiffs) have been heard at length when the petition was first listed on 23rd November, 2021 and judgment was reserved.

3. Brief resume of the facts giving rise to the present petition are detailed hereinafter.

3.1 In 1986, the respondents had filed a suit for possession and recovery of damages against the original defendant, being suit No.674/1986 pertaining to two rooms and a small kitchen at the back of 12, Padmini Enclave, New Delhi. The said suit was dismissed by the Trial Court vide judgment dated 30th January, 1993.

3.2 The aforesaid judgment was challenged by the original defendant by way of an appeal before this Court, being RFA No.474/1993. The said appeal was allowed in favour of the respondents vide judgment dated 30th October, 2003 and the judgment and decree passed by the Trial Court was set aside.

3.3 The petitioners challenged the said judgment before the Supreme Court and the Supreme Court vide order dated 15th December, 2003 granted stay against dispossession in favour of the petitioners. Vide order dated 17th November, 2008, the Supreme Court passed a direction that the said order would continue to operate throughout the pendency of the appeal filed by the petitioners.

3.4 The appeal filed by the petitioners being Civil Appeal No.6702/2008 was dismissed by the Supreme Court vide order dated 11th July, 2017.

3.5 Thereafter, the respondents filed an application, being CM No.44084/2017 in the disposed of RFA No.474/1993 seeking clarification/modification of the judgment dated 30th October, 2003 passed by this Court.

3.6 Vide order dated 10th July, 2018, the judgment and decree dated 30th October, 2003 was modified by this Court and it was directed that the suit would stand decreed with respect to the property at point 'X' in the site plan (Ex.PW1/A).

3.7 The execution petition No.350/2017 was filed on behalf of the respondents and the petitioners filed objections thereto. The said objections were dismissed by the Executing Court vide order dated 3rd April, 2019.

3.8 When the Court appointed bailiff went to execute the warrants of possession on 20th May, 2019, the petitioners did not permit the bailiff to execute the warrants of possession, as they contended that the portion in their occupation was not part of point 'X' in the site plan.

3.9 Accordingly, the respondents filed an application under Section 151 of the Code of Civil Procedure, 1908 (CPC) to get warrants of possession executed qua the suit property as shown in the site plan at point 'X', including all further constructions/additions undertaken by the petitioners.

3.10 The said application was allowed by the Executing Court vide impugned order dated 03rd March, 2021, observing/reasoning that:

(i) The petitioners claimed themselves to be the owners of the property lying behind the suit property as being part of 8-A, Kaushalya Park on the basis of an agreement to sell, which though executed prior to filing of the

suit, was never relied upon by the original defendant during the pendency of the suit or by the petitioners in the execution proceedings;

(ii) In the suit, the case set up by the original defendant was that he was in occupation of the aforesaid land in 8-A, Kaushalya Park on the basis of adverse possession;

(iii) The plea of adverse possession taken by the original defendant has been rejected by this Court in its judgment dated 30th October, 2003 in RFA No.474/1993;

(iv) The original defendant failed to show in the appeal that the portion of the property in his occupation fell in Khasra No.377;

(v) Even though the decree in favour of the respondents is only qua point 'X' shown in the site plan and not for the portion behind point 'X', the decree has to be executed in a manner that the respondents enjoy the fruit from the decree in its entirety and respondents cannot be forced into going into another litigation on account of illegal acts of the petitioners;

(vi) The petitioners kept on extending their occupation illegally behind the point 'X'. It would cause injustice to the respondents if the decree is not executed in respect of such illegally occupied portions of land by the petitioners. All the contentions of the petitioners with regard to having rights in the aforesaid portions of the property have been rejected by this Court in the judgment dated 30th October, 2003 in RFA No.474/1993.

(vii) Though respondents cannot be put in possession of the portion beyond what has been decreed in their favour, but petitioners can be evicted

from the said portion behind the property as the same has been illegally occupied by them so as to provide full justice to the respondents.

In view of the above, the Executing Court directed that warrants of possession be issued even in respect of the portion behind point 'X', illegally occupied by the petitioners.

4. Counsel appearing on behalf of the petitioners made the following submissions:

(i) The petitioners are willing to hand over possession of the suit property at point 'X' in the site plan in terms of the judgment and decree passed by this Court in RFA No.474/1993. It is the settled position of law that an Executing Court cannot go beyond the decree. In the present case, the final decree, as modified by the order dated 10th July, 2018 passed by this Court, was only in respect of the portion shown as point 'X' in the site plan. Hence, the execution proceedings cannot be carried out in respect of portions other than this. Reliance in this regard is placed on the judgment of the Supreme Court in *Rameshwar Dass Gupta Vs. State of U.P.* (1996) 5 SCC 728.

(ii) Respondents have not proved their ownership qua the said extra portions of the property and the petitioners claim rights over the said portions.

(iii) Respondents should file a separate suit in respect of the said extra portion of the property, which would determine whether the said portion belongs to the respondents or not.

(iv) The execution proceedings filed in 2017 are time barred as the decree was passed by this Court on 30th October, 2003 in RFA No.474/1993 and even though a stay against dispossession was granted by the Supreme Court on 15th December, 2003, there was no bar on the decree being executed. Reliance in this regard is placed on the judgments of the Supreme Court in ***Bimal Kumar and Anr. Vs. Shakuntala Debi and Ors.*** (2012) 3 SCC 548 and ***W.B. Essential Commodities Supply Corpn. Vs. Swadesh Agro Farming & Storage Pvt. Ltd. and Anr.*** (1999) 8 SCC 315.

5. *Per contra*, counsel appearing on behalf of the respondents has made the following submissions:

- (i) The suit property was given to the original defendant in the course of his employment with the respondents.
- (ii) It has been admitted in the written statement filed on behalf of the original defendant that he was in occupation of the property ad measuring 165 square yards. Admittedly, the portion in occupation of the petitioners as on date is 250 square yards. Accordingly, it is submitted that the portion beyond 165 square yards is an illegal occupation of the petitioners.
- (iii) The extra portion occupied by the petitioners came to the knowledge of the respondents only when the bailiff went to execute the warrants of possession on 20th May, 2019 and gave his reports dated 20th May, 2019, and subsequently gave a statement before the Executing Court on 11th September, 2019, stating that he could not take possession of the suit property.

(iv) A party cannot be allowed to take advantage of wrongful acts committed during the pendency of the suit/execution proceedings and the plaintiff cannot be expected to institute new suits with regard to wrongful acts done during the pendency of the suit/execution proceedings otherwise it would result in unending litigation. Reliance has been placed on the judgment of the Supreme Court in ***B. Gangadhar Vs. B.G. Rajalingam*** (1995) 5 SCC 238 to contend that the Executing Court would be justified to order removal of unlawful or illegal construction made *pendente lite* so that the decree of possession can be completely executed. Reliance in this regard has also been placed on the judgment of the Allahabad High Court in ***Mohd. Ismali Vs. Ashiq Husain*** AIR 1970 All 648.

(v) The doctrine of *lis pendens* in terms of Section 52 of the Transfer of Property Act, 1882 would be applicable in the facts of the present case.

(vi) It has been conclusively held in the judgment dated 30th October, 2003 of this Court in RFA No.474/1993 that the original defendant had no rights in respect of the aforesaid property.

(vii) The execution proceedings are not time barred as the same could not be initiated earlier on account of the order dated 15th December, 2003 of the Supreme Court directing stay against dispossession of the petitioners.

6. I have heard the counsels for the parties.

7. At the outset, it would be useful to refer to the judgment dated 30th October, 2003 passed by Division Bench of this Court in RFA No.474/1993. In paragraph 8 of the said judgment, it was specifically noted that the original defendant's defence in the written statement was that the original

defendant occupied a space ad measuring 165 square yards, started living there after raising construction in the year 1972-73 and accordingly, became owner of the said portion of the property by virtue of adverse possession. The said defence set up by the original defendant was rejected by the Division Bench and it was held in paragraph 18 as under:

“18. Having gone through the pleadings, the documentary evidence as well as oral and the rest of the record of the trial court, we are of the firm view that the defence set up by the respondent was nothing but a bundle of lies. He took different stand in his written statement followed by another inconsistent stand in his evidence. He even went to the extent of resiling from the Settlement Deed. Not only this he also made an abortive attempt to set up a defence of being in adverse possession. He also failed to establish as to how and in what manner, he had occupied a space measuring about 165 sq. yds. and then what made him to hand over the possession of this space to the appellant despite they being not the owner of this space of land. All pleas according to us taken by him have no legs to stand thus devoid of merits and with a view to gain time which he succeeded as the trial of this case was stretched to number of years as also the instant appeal.”

8. Counsel for the respondents has contended that the petitioners in their objections filed before the Executing Court had admitted to being in possession of 250 square yards, however, the said objections have not been placed on record before this Court. During the course of arguments, it has been admitted on behalf of the petitioners that the petitioners are currently in occupation of 250 square yards. Throughout, the case of the original defendant was that he was in occupation of 165 square yards. If that was the

case, there was no basis for the petitioners to now claim rights in portions of the suit property in excess of 165 square yards.

9. The position that emerges is that during the pendency of the legal proceedings, some further area had been illegally occupied by the petitioners and construction was raised thereupon. The intention of the petitioners is to continue with their illegal occupation of the said area. The report of the bailiff dated 20th May, 2019, and the statement of the bailiff recorded before the Executing Court on 11th September, 2019 reveal that the construction carried out by the petitioners extended behind point 'X'. Since, the construction carried out at point 'X' was contiguous with the construction carried out behind point 'X', it was not possible for the bailiff to take possession of the portion at point 'X'.

10. The Supreme Court in **B. Gangadhar** supra while dealing with the powers of the Executing Court, observed that the Executing Court is mandated to decide all questions relating to right, title or interest in the property in the course of execution proceedings. The relevant observations of the Supreme Court are set out below:

“6. ...If any obstruction is raised by putting up a construction pendente lite or prevents the passage or right to access to the property pendente lite, the plaintiff has been given right and the decree holder is empowered to have it removed in execution without torturous remedy of separate suit seeking mandatory injunction or for possession so as to avoid delay in execution or frustration and thereby defeat the decree. The executing court, therefore, would be justified to order its removal of unlawful or illegal construction made pendente lite so that the decree for possession or eviction, as the case may be, effectually and completely executed and the delivery of possession is given to the

decree holder expeditiously. Admittedly, pending suit the petitioner had constructed shops and inducted tenants in possession without permission of the court. The only course would be to decide the dispute in the execution proceedings and not by a separate suit.

7. Order 21, Rule 35(3) envisages that:

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 women 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.

8. Rule 35(3) of Order 21 C.P.C itself manifests that when a decree for possession of immovable property was granted and delivery of possession was directed to be done, the court executing the decree is entitled to pass such incidental, ancillary or necessary orders for effective enforcement of the decree for possession. That power also includes the power to remove any obstruction or super-structure made pendente lite. The exercise of incidental, ancillary or inherent power is consequential to deliver possession of the property in execution of the decree. No doubt, the decree does not contain a mandatory injunction for demolition. But when the decree for possession had become final and the judgment-debtor or a person interested or claiming right through the judgment-debtor has taken law in his hands and made any constructions on the property pending suit, the decree-holder is not bound by any such construction. The relief of mandatory injunction, therefore, is consequential to or necessary for effectuation of the decree for possession. It is not necessary to file a separate suit when the construction was made pending suit without permission of the court. Otherwise, the decree becomes inexecutable driving the plaintiff again for another round of litigation which the code expressly prohibits such multiplicity of proceedings.”

11. The purport of the aforesaid judgment is that Executing Court has the power to pass any incidental or necessary order to ensure that the decree for possession is fully enforced. The decree passed in favour of the decree holder cannot be frustrated by the judgment debtor by making unauthorized constructions. If any such unlawful construction is made by the judgment debtor *pendente lite*, the power of the Executing Court would extend to order removal of such unauthorized construction made *pendente lite*. The decree holder cannot be compelled to file a separate suit in order to get the said unlawful construction removed.

12. The Allahabad High Court in ***Mohd. Ismail*** supra has also observed that principles enshrined in Section 52 of the Transfer of Property Act, 1882 would also apply to wrongful construction made during the pendency of the suit/execution proceedings. Therefore, it was observed that the Executing Court is fully empowered to order removal or demolition of construction made during the pendency of the suit or during the execution of decree.

13. The dicta of the aforesaid judgments is squarely applicable in the facts and circumstances of this case. The issue to be examined in the present petition is not whether the respondents are the owners of the extra portion occupied by the petitioners, but whether the petitioners can continue to be in illegal occupation of the aforesaid portions by raising constructions thereupon so as to frustrate the decree passed against them. The entire attempt of the petitioners was to somehow frustrate the decree and continue to be in unlawful occupation of the property in question by raising constructions during the pendency of the legal proceedings. The case of the original defendant in the written statement that he was in legal occupation of

165 square yards of the property at point 'X', has been rejected by this Court in the judgment dated 30th October, 2003 in RFA No.474/1993. If that be so, there is no basis for the petitioners to contend that they were in legal occupation or ownership of portions behind point 'X' in excess of 165 square yards. It is obvious that during the course of the legal proceedings, the petitioners have encroached upon area behind point 'X' and raised construction thereupon. Further, the construction has been raised in a manner that it is contiguous with the existing structure at point 'X', so that in the event the decree is passed against them, they can frustrate the decree by continuing to be in occupation of the portions illegally encroached upon by them. Nothing has been placed on record by the petitioners which shows them to be owners or in lawful occupation of the portions behind point 'X'.

14. There is no quarrel with the legal proposition laid down in ***Rameshwar Dass Gupta*** supra that the Executing Court cannot travel beyond the order or decree under execution. The said judgment was in respect of a money claim and the Executing Court had granted interest, which was not a part of the decree under execution. It was in that context that the Supreme Court observed that the Executing Court has exceeded its jurisdiction in the said case. Therefore, the said judgment cannot come to the aid of the petitioners. The dicta of the Supreme Court in ***B. Gangadhar*** supra to the effect that the Executing Court can pass incidental or ancillary directions as to full and complete effect to the enforcement of the decree, would apply in the facts and circumstances of the present case.

15. Further, the objection taken by the petitioners of the execution proceedings being time barred, is completely misconceived. The suit was

filed for a decree of possession. The decree of possession was passed in favour of the respondents on 30th October, 2003. The said decree was challenged by the petitioners before Supreme Court and vide order dated 15th December, 2003, the Supreme Court granted stay against dispossession of the petitioners, which was vacated only when the appeal was dismissed by the Supreme Court on 11th July, 2017.

16. Clearly, the execution proceedings could not have been filed by the respondents in view of the stay order passed by the Supreme Court. Therefore, there is no merit in the plea of the petitioners that the execution proceedings were time barred. Accordingly, the judgment cited by the petitioners in **Bimal Kumar** supra has no applicability in the present case as in the said case, there was no stay by any Court in respect of the decree in favour of the decree holder and therefore, there was no bar on execution of the same. Similarly, the judgment in **W.B. Essential Commodities Supply Corpn.** supra has no application in the present case as what has been held in the said case is that decree holder cannot have the benefit of exclusion of time taken for obtaining certified copy of the decree, and that the period of limitation runs from the date of the decree and not from the date when the decree is drawn up and signed by the Judge.

17. The respondents having succeeded in their suit all the way up to the Supreme Court cannot be denied the fruits of the decree on account of the unlawful acts of the petitioners. The respondents cannot be compelled to file multiple litigations when they have already fought a litigation against the original defendants and the petitioners since 1986 and eventually succeeded

after 32 years. The petitioners cannot be allowed to gain from their wrongful acts.

18. The Supreme Court in ***Ramesh Chand Sankla and Ors. Vs. Vikram Cement and Ors.*** (2008) 14 SCC 58 has propounded the principles to be kept in mind while exercising jurisdiction under Article 227 of the Constitution of India. In this regard, reference may be made to paragraphs 90, 91 and 98 of the said judgment which are set out below:

“90. Now, it is well settled that jurisdiction of the High Courts under Articles 226 and 227 is discretionary and equitable. Before more than half a century, the High Court of Allahabad in the leading case of Jodhey v. State [AIR 1952 All 788] observed: (AIR p. 792, para 10)

“10. ... There are no limits, fetters or restrictions placed on this power of superintendence in this clause and the purpose of this article seems to be to make the High Court the custodian of all justice within the territorial limits of its jurisdiction and to arm it with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the bodies mentioned therein.”

(emphasis supplied)

91. The power of superintendence under Article 227 of the Constitution conferred on every High Court over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction is very wide and discretionary in nature. It can be exercised ex debito justitiae i.e. to meet the ends of justice. It is equitable in nature. While exercising supervisory jurisdiction, a High Court not only acts as a court of law but also as a court of equity. It is, therefore, power and also the duty of the Court to ensure that power of superintendence must “advance the ends of justice and uproot injustice”.

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98. From the above cases, it clearly transpires that powers under Articles 226 and 227 are discretionary and equitable and are required to be exercised in the larger interest of justice. While granting relief in favour of the applicant, the court must take into account the balancing of interests and equities. It can mould relief considering the facts of the case. It can pass an appropriate order which justice may demand and equities may project. As observed by this Court in *Shiv Shankar Dal Mills v. State of Haryana* [(1980) 2 SCC 437 : (1980) 1 SCR 1170] courts of equity should go much further both to give and refuse relief in furtherance of public interest. Granting or withholding of relief may properly be dependent upon considerations of justice, equity and good conscience.”

19. In *Roshan Deen Vs. Preeti Lal* (2002) 1 SCC 100, the Supreme Court has observed that while exercising jurisdiction under Article 227 of the Constitution of India, the High Court has to ensure that no injustice has been done on account of erroneous interpretation of law.

20. It emerges from the aforesaid judgments that powers under Articles 226 and 227 of the Constitution of India are discretionary and equitable and have to be exercised in larger interest of justice. Applying the aforesaid principles to the facts and circumstances of the present case, there is no equity in favour of the petitioners. The petitioners are seeking to derive undue advantage from their own wrongful and illegal acts of unlawfully occupying portions of the property and raising unlawful construction thereupon so as to frustrate the execution of the decree. Such a litigant is not entitled to invoke the equitable jurisdiction of this Court under Article 227 of the Constitution of India.

21. Therefore, in exercise of jurisdiction under Article 227 of the Constitution of India, this Court is not inclined to interfere with the impugned order passed by the Executing Court.

Dismissed.

AMIT BANSAL, J.

DECEMBER 17, 2021

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