

Form No. J (1)

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION

Present:

The Hon'ble Justice Biswajit Basu.

C.O. 1529 of 2021

SRI BISWANATH GHOSH & ORS.
VS.
SRI. TARUN PRADHAN & ORS.

For the petitioners:

Mrs. Shohini Chakraborty,
Mr. Kaushik Chowdhury,
Mr. Ishan Bhattacharya.

For the respondent:

Mr. Kanailal Samanta,
Mr. Suprabhat Bhattacharya.

Heard on : 04.03.2022

Judgment on : 30.03.2022

Biswajit Basu, J.:

1. The instant revisional application under Article 227 of the Constitution of India is directed against the Order No. 125 dated February 25, 2021 passed by the Additional Court of learned Civil Judge (Junior Division) at Tamluk,

District- Purba Medinipur in Judicial Misc. Case No. 10 of 2014 arising out of Title Execution Case No. 05 of 2013.

2. The petitioners along with some other persons filed a suit being Title Suit No. 92 of 2000, subsequently re-numbered as Other Suit No. 18 of 2007 for declaration of their right, title and interest over the southern half of $25\frac{1}{2}$ decimal of land in plot no. 420 in Khatian No. 303 under Mouja Kumar Ara and as a consequential relief thereof, the petitioners prayed for a decree of permanent injunction.

3. The father of the opposite party nos. 1 and 2, Rabindra Nath Pradhan was the defendant no. 5 in the said suit, who contested the said suit on a defence that suit plot no. 420 along with other non-suit plots belong to one Prasanna Kumar Ghosh, predecessor-in-interest of the plaintiffs and after his death, the suit plot was inherited by his two sons Kiran Chandra Ghosh and Manindra Nath Ghosh in equal shares. The said two brothers mutually partitioned the properties left by their father and by virtue of the said partition said Manindra nath Ghosh got the suit plot no. 420 along with other non-suit plots. The said Manindra Nath Ghosh, thereafter by a deed dated August 27, 1981 sold the $32\frac{1}{4}$ decimal of land to one Bansibadan Singh who later exchanged his said purchased lands by the deed dated February 02, 1993 with the defendant no. 5. The said defendant in the said suit further claimed that by a deed dated January 29, 1993 he purchased $6\frac{3}{4}$ decimal of land in the said suit plot no. 420.

4. The Additional Court of learned Civil Judge (Junior Division) at Tamruk, District- Purba Medinipur by the judgment and decree dated January 28, 2011 held that the defendant no. 5 has no right, title and interest over the suit property and decreed the said suit in the following form:-

“That the suit be and the same is decreed on contest against defendant No. 5 and ex parte against other defendants. Plaintiff do get a decree of declaration of title over the property as described in schedule ‘Ka’ of the plaint with further declaration that deed as specified in schedule ‘Ga’ of the plaint is void. Defendants are restrained by way of permanent injunction to disturb the peaceful possession of the plaintiff over the property as described in the schedule ‘Ka’ of the plaint.”

5. The petitioner on December 19, 2013 put the said decree of permanent injunction into execution which gave rise to the connected Execution case before the Additional Court of learned Civil Judge (Junior Division) at Tamruk, District- Purba Medinipur. The petitioners in the said execution case alleged that the opposite parties violating the decree of injunction have forcefully entered into the suit property on April 22, 2012, on November 30, 2012, and on April 29, 2013 and reaped the paddy cultivated by the petitioners on the suit land, for which the petitioners lodged consecutive complaints with the Nanda Kumar Police Station. The further allegation of the petitioners is that the opposite parties have forcefully taken electricity line over the suit property. The petitioners in the said execution case filed an application under Order XXI Rule 32 of the Code of Civil Procedure and prayed three-fold reliefs against the opposite parties alleging said violation of the said decree of permanent injunction viz. detention of the opposite parties in the Civil Prison, recovery of

possession of the suit property and attachment of the properties described in the schedule appended to the said application.

6. The judgment debtor nos. 10 and 11, the opposite party nos. 1 and 2 herein only contested the said execution case. The said judgment-debtors filed written objection to the said application under Order XXI Rule 32 of the Code to which the petitioners also filed their reply. The said opposite parties in their said written objection reiterated the defence of their father taken in the suit i.e. by virtue of different purchases, their father acquired right, title, interest and possession over part of the said suit plot no. 420 and denied the allegation of the petitioners that they have violated the said decree of injunction. The Executing Court treated the said written objection of the opposite party nos. 1 and 2 as an application under Section 47 of the Code and registered it as Judicial Miscellaneous Case No. 10 of 2014.

7. On the prayer of the petitioners an advocate Commissioner was appointed in the said misc. case to hold local inspection of the suit property. The contesting parties in the said Misc. case adduced oral evidence in support of their respective cases. In the said proceeding, the advocate Commissioner proved his report as O.P.W₂ and one constable from the Nanda Kumar Police Station proved the general diaries lodged by the petitioners complaining the alleged violation of the said decree of injunction as O.P.W₃. The said report of the Commissioner and the said general diaries were marked in the said Misc. Case as Exhibit A (series) and Exhibit B (series) respectively.

8. The Executing Court by the Order No. 113 dated February 05, 2019 allowed the said judicial misc. case and dismissed the connected execution case holding that the Executing Court is in complete dark about the true picture of the suit property before or at the time of passing the decree of permanent injunction and the Commissioner's report suggested that the nine trees which have been cut down were situated at the south-eastern side of the suit dag whereas the decree of injunction is in respect of 25.5 decimal of land on the southern side of the suit dag, and the commissioner in his report has not mentioned as to whether the said trees were cut down recently or not and it also did not mention whether the electricity connection is new or old or whether it has been taken under the direction of the judgment-debtors.

9. The petitioners assailed the said order of the Executing Court in C.O. 2170 of 2019. This Court by the judgment and order dated February 11, 2020 set aside the said order of the Executing Court holding, inter alia, that the reasons ascribed by the Executing Court in dismissing the said Execution case are not sustainable and remanded the matter back to the Executing Court with the following observations and direction to decide the said execution case and the said judicial misc. case thereto afresh in accordance with law:-

“On perusal of the decree under execution it appears that by the said decree the title of the petitioners over the suit property has been declared and by the decree of permanent injunction the defendants of the said suit have been permanently restrained from disturbing the peaceful possession of the petitioners over the suit property. The said decree was passed on contest against the defendant no. 5 who happened to be the father of the opposite party nos. 1 and 2.

I am at one with Mrs. Chakraborty, that the said decree is binding upon the opposite party nos. 1 and 2.

The decree was put into execution for the purpose of restoration of possession of the suit property which has allegedly been taken away from the petitioners by the judgment-debtors in violation of the said decree of permanent injunction.

Therefore, merely because of the failure of the decree holders to prove that the judgment debtors have willfully violated the said decree will not entail the dismissal of the entire execution case.

In all, the reasons ascribed by the learned executing Court in dismissing the said execution case are not sustainable.

The order impugned is therefore set aside.”

10. The Executing Court, thereafter, heard the said judicial misc. case and by the order impugned has allowed it again consequently dismissed the said execution case. The reasoning of the order impugned is a replica of the earlier Order No. 113 dated February 05, 2019 which was set aside in C.O. 2170 of 2019.

11. The learned Judge of the executing Court should have been conscious that she is deciding the said judicial misc. case on remand, as such, while deciding the said case afresh, is bound to take into consideration the observations and/or directions of the order of remand but the tenor of the order suggests that the learned Judge did not care to follow the said basic principle of law.

12. In an application under Section 47 of the Code, questions relating to execution, discharge or satisfaction of the decree under execution can only be considered but the executing Court being unmindful about such limited scope of the said provision of the Code went into the investigation as to the correctness of the decree under execution.

13. The reasons recorded in the order impugned in rejecting the Commissioner's report not only demonstrates total non-application of mind by the learned Judge but also the said reasons find resemblance with the reasons supplied by her predecessor-in-office in discarding the said report by the earlier order, which has already been set aside.

It is preposterous to suggest that an advocate Commissioner who was appointed subsequent to the alleged violation of the decree of injunction is obliged to disclose in his report who had reaped the paddy from the suit land or when the electricity line was installed over the suit land.

14. The observation of the learned Judge that the judgment-debtors have shares in the suit property clearly reflects her lack of understanding about the scope of Section 47 of the Code inasmuch as in the suit it has been declared that the predecessor-in-title of the opposite party nos. 1 and 2 had no title over the suit property and the said decree is binding upon the opposite party nos. 1 and 2 the Court executing the said decree cannot reopen the said issue.

15. The learned Judge also has failed to appreciate the extent of evidentiary value attached with the general diary lodged by the petitioners complaining

violation of the said decree of prohibitory injunction, the said diaries are relevant only to the extent that the said incident was reported to the concerned Police Station. The officer from the police station proved the entries in the diary-book kept in the course of regular business of the said police station, unfortunately the provision of Section 34 of the Indian Evidence Act, 1872 was completely unnoticed, as a consequence thereof, the learned Judge has erroneously discarded the Exhibit B(series) for want of personal knowledge of the said police officer about the contents of the said general diaries.

16. The Executing Court has refused to grant relief to the petitioners for recovery of possession of the suit property holding that the decree-holders have prayed for recovery of possession by evicting judgment-debtors from the suit schedule property so it is clear that the decree-holders, plaintiffs have been dispossessed from the suit property after passing judgment and decree of the suit as in the said suit there was no such prayer regarding recovery of possession the Executing Court cannot go behind the decree, it has no power to modify the terms of the decree, as such decree-holders are not entitled to recovery of possession. The aforesaid reasoning runs counter to the scope of Order XXI Rule 32(5) of the Code, the issue therefore, requires a little bit elaboration.

17. The Calcutta High Court was consistent in its view that Order XXI Rule 32 of the Code applies to prohibitory as well as mandatory injunction (See the case of **SACHI PROSAD MUKHERJEE vs. AMAR NATH ROY CHAUDHURY** reported in **AIR 1919 Calcutta 674** and the case of **HEMCHANDRA NASKAR**

vs. NARENDRANATH BASU reported in **LXI Indian Law Reporter, 148**).

There were contrary views on the said issue of other High Courts. To obviate the said controversy that arose as to the meaning of the phrase “**act required to be done**” appearing in body of Order XXI Rule 32 of the Code, **the Law Commission in its 144th report** recommended as follows:-

“Clarification is obviously needed on the point at issue. It is suggested that as a matter of legislative amendment, it is preferable to incorporate the wider view (though the majority of the High Courts have taken a contrary view) and to provide that the words “act required to be done” cover prohibitory (as well as mandatory) injunctions. This would also be in conformity with section 3(2), General Clauses Act, 1897, which provides that in all Central Acts, the word “act” includes illegal omissions. Besides this, on the merits, there is no justification why a decree-holder should be driven to a separate suit for getting relief in the nature of enforcement of a decree which they must have obtained after considerable expenditure of time, labour and money.”

18. Pursuant to the aforesaid recommendation, an explanation has been added to Order XXI Rule 32(5) of the Code vide **Code of Civil Procedure (Amendment) Act, 2002** with effect from July 01, 2002. The explanation clarifies the situation that the “**act required to be done**” covers prohibitory as well as mandatory injunction. Therefore, the learned Judge of the Executing Court clearly fell into error in refusing the prayer of the petitioners for recovery of possession of the suit property.

Summing up the discussions made above, this Court set aside the order impugned, the Judicial Misc. Case No. 10 of 2014 is hereby dismissed, the Title Execution Case No. 5 of 2013 is restored to its original file and number. The

Additional Court of learned Civil Judge (Junior Division) at Tamluk, District-Purba Medinipur is directed to dispose of the said execution case in the light of the observations made hereinabove, in accordance with law.

The executing Court shall complete its exercise in this regard as expeditiously as possible preferably within six available effective working months of the said Court from the date of communication of this order and in doing so shall not grant any unnecessary adjournment to either of the parties.

The learned Registrar Judicial shall communicate this order to the learned Judge of the Executing Court for her future guidance, a copy of this order be also communicated to the predecessor-in-office of the present learned Judge of the said Executing Court, wherever he is now posted, for his future guidance also.

C.O. 1529 of 2021 is disposed of with the above terms without any order as to costs.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(BISWAJIT BASU, J.)