

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

CO 427 of 2022
with
CAN 1 of 2022

Nirmal Bhattacharya
vs.
Pijush Kumar Basak

For the petitioner : Mr. Syamal Kumar Das,
Mr. Aniruddha Chatterjee,
Mr. Sarada Prasad Ray,
Ms. Krishna Yadav,
Ms. Smita Pal.

For the opposite party : Mr. Probal Mukherjee,
Mr. Siddhartha Banerjee,
Mr. Avishek Guha,
Mr. Debarati Das,
Ms. Akansha Chopra.

Hearing concluded on: 26.06.2023
Judgment on: 04.08.2023

Shampa Sarkar, J.:-

1. The revisional application arises out of an order dated February 8, 2022 passed in Misc Case No.19 of 2021, by the learned Civil Judge, (Senior Division) 2nd Court at Barasat.
2. The application under Section 47 of the Code of Civil Procedure filed by the petitioner in Title Execution Case No.35 of 2017, arising out of judgment and decree passed in Title Suit No.141 of 2013, was rejected.

3. The petitioner, as the judgment debtor, contended that he was not aware that the suit had proceeded. Summons were not received from the transferee court regarding analogous trial of the two suits. Only when summons of the execution case were served, the petitioner realized that the Title Suit No.141 of 2013 had been decreed. Hence, a prayer for rejection of the execution case was made.

4. The objections taken in Misc Case No.19 of 2021 was that the petitioner/judgment debtor in Title Execution Case No.35 of 2017 had filed a title suit before the learned Civil Judge (Junior Division) 3rd Court at Sealdah, being Title Suit No.440 of 2012. The said title suit was filed for declaration of his tenancy right and injunction against the opposite party who was the decree holder in Title Execution Case No.35 of 2017. Until, the prior suit was disposed of, the decree in the subsequent suit could not be executed. It was further stated that the suits were directed to be tried together, but Title Suit No. 141 of 2013 had been decreed earlier, without any analogous trial.

5. Let me deal with the facts first. Title Suit No.440 of 2012 was filed by the petitioner and Title Suit No.141 of 2013 was filed by the opposite party. The opposite party filed an application under Section 24 of the Code of Civil Procedure seeking transfer of the Title Suit No.440 of 2012, from the Court of the Learned Civil Judge (Junior Division), 3rd Court at Sealdah to the Court of the learned Civil Judge (Senior Division), 2nd Court at Barasat for analogous hearing of Title Suit No. 440 of 2012 and Title Suit No.141 of 2013. Title Suit No. 141 of 2013 was a suit for eviction, recovery of khas

possession and mesne profits filed by the opposite party/decreed holder against the petitioner/judgment debtor.

6. The application for transfer was allowed. A direction for analogous hearing of Title Suit No.141 of 2013 with Title Suit No.440 of 2012 before the Learned Civil Judge, (Senior Division) 2nd Court at Barasat was passed. The petitioner contended that the order of transfer was passed in his absence.

7. According to the petitioner, no evidence was recorded and no trial was held in respect of Title Suit No. 440 of 2012. Title Suit No. 141 of 2013 was heard and decreed on August 30, 2017. Title Suit No. 440 of 2012 remained in the files, without any progress. Instead, the later suit proceeded and was decreed, in violation of the direction of the learned District Judge, North 24-Parganas, for analogous trial of both the suits by the learned Civil Judge, (Senior Division) 2nd Court at Barasat vide order dated May 4, 2015. According to the petitioners, without the trial of Title Suit No. 440 of 2012, the decree passed in Title Suit No. 141 of 2013 was a nullity and thus, in-executable. Title Execution Case No 35 of 2017 should be dismissed.

8. The decree holder denied the contentions of the petitioner. It was stated that the judgement and decree in Title Suit No. 141 of 2013 dated August 30, 2017 was passed on contest. The same was appealed from. The appeal was registered as Title Appeal No.65 of 2017. The title appeal was dismissed on September 11, 2018 on merits. Upon dismissal of the appeal, the Misc Case was filed. The records of Title Suit No. 141 of 2013 and Title Suit No. 440 of 2012 were sent to the transferee court. Title Suit No.440 of 2012 was renumbered as Title Suit No. 668 of 2015. The suits were fixed for

analogous hearing on consecutive dates, namely, June 1, 2015, August 12, 2015, January 29, 2016, March 9, 2016, May 12, 2016, June 28, 2016 and July 22, 2017. On July 22, 2016, the suit filed by the petitioner namely, Title Suit No. 668 of 2015 was dismissed for non-compliance of the Court's order. Hence, it was submitted that the learned Court below rightly rejected the Misc Case. It was prayed that the revisional application be dismissed on the ground of misleading statements and suppression of facts.

9. Learned Advocate for the petitioner submitted that the order impugned suffered from several irregularities. The fact that Title Suit No. 440 of 2012 had been renumbered as Title Suit No. 668 of 2015 was not known to the petitioner. Secondly, when the learned District Judge had directed both the suits should be tried analogously, Title Suit No. 668 of 2015, could not have been dismissed for non-compliance of the Court's order. It was further submitted that Title Suit No. 440 of 2012 was the mother suit, being the earlier suit and the same could not have been dismissed without analogous trial. In support of the Misc Case, some judgments were relied upon by the petitioner, which were not considered by the learned Court below. Moreover, as the judgment and decree dated August 30, 2017 passed in Title Suit No. 141 of 2013 did not mention anything about the dismissal of Title Suit No. 440 of 2012 (renumbered as Title Suit No. 668 of 2015), the learned Court below should have adopted a liberal approach while deciding the Misc Case especially because an order was passed by a superior court to hear both the suits analogously. The later suit, should have been ideally stayed by application of the provisions of Section 10 of the Code of Civil Procedure. The learned executing court, only

on the basis of the content of an information slip, that Title Suit No. 668 of 2015 had been dismissed, could not have rejected the Misc Case.

10. This Court, upon hearing the learned Advocate for the respective parties, finds that the learned Court below had considered the provisions of law and the facts pleaded by the parties. The learned court arrived at the conclusion that the scope of Section 47 of the Code of Civil Procedure was limited to questions relating to execution, discharge or satisfaction of the decree. Upon consideration of the facts and law, the learned Court below found that the claim of the petitioner about the pendency of Title Suit No. 440 of 2012, to be incorrect. Title Suit No. 440 of 2012 had been renumbered as Title Suit No.668 of 2015 and the same had been dismissed for non-compliance of the Court's order. From the judgment and decree passed in Title Suit No.141 of 2013, it was apparent that the defendant/petitioner had contested the suit all along and being dissatisfied with the judgment and decree had preferred a title appeal. The title appeal was also dismissed upon contested hearing. After dismissal of the title appeal, the decree holder filed the execution case. Thus, the contention of the petitioner that the judgment and decree passed in Title Suit No.141 of 2013 could not be executed, was wholly misconceived. Rather, the Court found it surprising that the point which was raised in execution, was never raised by the petitioner in the title appeal.

11. The learned Court also found that the principles of res judicata would be applicable as the issue of tenancy was finally decided. A decree of eviction was passed against the petitioner. The decree attained finality. The

petitioner was trying to delay the execution, thereby depriving the decree holder from enjoying the property.

12. This Court finds that the order impugned is neither perverse, nor does it suffer from material irregularity. The Misc Case under Section 47 of the Code of Civil Procedure was filed on the ground of pendency of Title Suit No.440 of 2012.

13. First, this Court finds from the records that the petitioner had contested Title Suit No.141 of 2013, but did not ever raise the issue of pendency of Title Suit No.440 of 2012 which had been renumbered as Title Suit No.669 of 2015 after transfer of the same.

14. Secondly, learned Civil Judge, (Senior Division) 2nd Court, Barasat while decreeing Title Suit No 141 of 2013, took into consideration the defence case in detail. It was held that there was not a single piece of paper which would establish that the petitioner was a tenant under the plaintiff. That no notice was necessary for eviction of a licensee. The plea of the petitioner that the plaintiff as a member of a Cooperative Society, was barred from proceeding before the civil court and the suit for eviction should be tried by the Registrar of Cooperative Society, was also negated by the learned Court. It was held that the tenant could not challenge the title of the landlord and validity of an agreement of possession, voluntarily entered into by the owner and the licensee, could not be tried by the Registrar of Co-operative Societies.

15. The order-sheet reveals that on May 4, 2015, the learned Civil Judge, (Senior Division) 2nd Court, Barasat, received the case records of Title Suit No.440 of 2012. Title Suit No 440 of 2012 was renumbered as Title Suit

No.668 of 2015. The order-sheet further reveals that Title Suit No.668 of 2015 was taken up on various dates, but the petitioner failed to appear after August 12, 2015. On August 12, 2015 both parties filed Advocate hazira. As plaintiff/petitioner failed to take steps in Title Suit No.668 of 2015, by an order dated March 9, 2016, the plaintiff/petitioner was asked to show cause why the injunction application would not be dismissed. The plaintiff/petitioner was given two further opportunities in the said suit, to file his reply to the show-cause. Thereafter, by an order dated July 22, 2016, Title Suit No.668 of 2015 was dismissed for non-compliance of the Court's order. The petitioner had filed hazira and an affidavit. The affidavit was not accepted by the learned court.

16. The order is quoted below:-

"Plaintiff files hazira. The time is fixed for filing of show cause by the plaintiff but the plaintiff does not take any steps to that effect.

It is fixed at 03:25 P.M.

Considering the affidavit of the plaintiff, I have no hesitation to hold that the plaintiff has failed to comply the order of this court and the instant suit is liable to be dismissed.

Hence, it is ordered.

That the suit be and the same is dismissed for non compliance of the court's order."

17. From the judgment and decree passed in the Title Suit No141 of 2013 by the learned Civil Judge, (Senior Division) 2nd Court, Barasat, it appears that the petitioner contested the suit, adduced evidence and participated in the proceeding throughout, without taking any step for restoration of Title Suit No.440 of 2012, renumbered as Title Suit No.668 of 2015. The submission of the petitioner that he was not aware of the dismissal is absurd, misleading and untrue. After transfer of Title Suit No.440 of 2012

and after the same was renumbered, the petitioner had appeared, Thereafter the plaintiff/petitioner failed to take steps. The petitioner continued to contest Title Suit No.141 of 2013. This court cannot accept the contention of the petitioner that the petitioner was unaware of the fate of Title Suit No.668 of 2015. The law supports the diligent and vigilant and not the callous and negligent. The petitioner cannot be allowed any indulgence. The proposition of the petitioner that Title Suit No.668 of 2015, being the earlier suit should have been disposed of first, is preposterous. There was already a direction for analogous trial. The application under Section 47 of the Code of Civil Procedure, by no stretch of imagination, could have been allowed. The petitioner, was aware that Title Suit No.440 of 2012 had been transferred to the Court of learned Civil Judge, Senior Division 2nd Court, Barasat for analogous hearing with Title Suit No.141 of 2013. That Title Suit No 440 of 2012 was renumbered. The petitioner appeared in the suit. The suit was dismissed for non-compliance of the Court's order. The affidavit filed by the petitioner was not accepted. The petitioner did not bother to restore the earlier suit, but continued to contest the Title Suit No.141 of 2013. Later, during pendency of the revisional application, an application under Order IX Rule 9 of The Code of Civil Procedure was filed in Title Suit No. 669 of 2015, for restoration of the said suit along with an application for condonation of delay. The application was rejected.

18. From the judgment and decree passed in Title Suit No.141 of 2013, the fact that the petitioner examined himself as PW-1 and had contested the suit, is available. The objection under Section 47 of the Code was filed on erroneous and untrue statements. From the judgment passed in Title Appeal

No.65 of 2017 by the learned Additional District Judge, 3rd Court at Barasat arising out of judgment and decree dated August 30, 2017 passed by the learned Civil Judge Senior Division, 7th Court at Barasat, it appears that all points were raised with regard to the maintainability of the suit, the validity of the notice to quit dated March 2, 2013, default and the relation between the landlord and the petitioner.

19. The issues were decided against the petitioner. The Petitioner did not ever raise the issue of pendency of an earlier suit which was directed to be heard analogously with Title Suit No. 141 of 2013. The principle of issue estoppel and res judicata would apply. In any event, the trial court and the appeal court held that the petitioner failed to prove his tenancy. Such issue has attained finality.

20. Thus, this court finds that only to stall the execution and to prevent the landlord from executing the decree of eviction, the petitioner had filed the application under Section 47 of Code of Civil Procedure on erroneous facts and by suppressing material information.

21. In the decision of ***Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman***, reported in ***AIR 1970 SC 1475***, the Hon'ble Apex Court had considered the scope of an objection under Section 47 of the Code in relation to the executability of a decree. It was held that only such a decree which was a nullity and not a decree which was erroneous either in law or on facts, could be objected to at the execution. The Apex Court held as follows:-

“6. A court executing a decree cannot go behind the decree: between the parties or their representatives it must take the decree

according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representative on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a court which has no inherent jurisdiction to make, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.....”

22. In the decision of ***Rajdeo Ram vs. Gita Rani Sarkar*** reported in **2011 SCC OnLine Cal 558**, the Hon’ble Apex Court held as follows:-

“13. In this connection, it would be pertinent to refer to a decision reported in AIR 1993 Orissa 251 (Jai Raut v. Sabitri Dei). Hon’ble B.L. Hansaria, C.J. (as His Lordship then was) while considering a similar plea had the occasion to observe that the plea of the judgment debtors in their petition under Section 47 of the Code because the property had vested in the State Government was not really available on the principle of constructive res judicata. It was observed as follows :

“*****This point was thus not taken not only before the trial Court, but in the first appellate Court as well as before this Court in Civil Revision No. 252 of 1974. To allow this point to be taken for the first time in the executing Court could almost be a travesty of justice and would give a very long scope to judgment-debtors who after failing at all levels during trial put up pleas of non-executability which was very much available at the time of trial, which would be totally against larger interest of the society, because a litigation fought to the end at the trial stage would be set at naught by taking pleas available earlier and not taken either knowingly or even unknowingly. If constructive res judicata were not to be applied in such a case, very few decrees would attain finality and decrees would remain paper tigers, which cannot be allowed to happen.”

14. I am convinced that the judgment-debtor/petitioner has obviously left no stone unturned to prolong the litigation and by

remaining in unlawful possession of the suit property. The decree that the decree-holder/opposite party has obtained cannot be allowed to be defeated at the execution stage by going behind the decree. Even though the petition under Section 47 may not have been posted for hearing on the day it was rejected, it appears that the learned advocate for the judgment-debtor/petitioner was duly heard on its merits and the executing Court was of the view that the grounds stated in the petition were vague and baseless and it was misconceived. It was further ruled that the petition under Section 47 had been filed only to drag the execution proceeding. There is, therefore, no reason to interfere.

15. In so far as the contention raised before me regarding non-description of the suit property in the form of a schedule appended to the plaint, it is found that the suit property was fully described in paragraph 1 of the plaint and, therefore, there was sufficient compliance of Order 7 Rule 3 of the Code.”

23. In the decision of ***Rahul S. Shah v. Jinendra Kumar Gandhi***, **(2021) 6 SCC 418**, the Hon’ble Apex Court held as follows:-

“**23.** This Court has repeatedly observed that remedies provided for preventing injustice are actually being misused to cause injustice, by preventing a timely implementation of orders and execution of decrees. This was discussed even in the year 1872 by the Privy Council in *General Manager of the Raj Durbhunga v. Coomar Ramaput Sing* [*General Manager of the Raj Durbhunga v. Coomar Ramaput Sing*, 1872 SCC OnLine PC 16 : (1871-72) 14 Moo IA 605] which observed that the actual difficulties of a litigant in India begin when he has obtained a decree. This Court made a similar observation in *Shub Karan Bubna v. Sita Saran Bubna* [*Shub Karan Bubna v. Sita Saran Bubna*, (2009) 9 SCC 689 : (2009) 3 SCC (Civ) 820] , wherein it recommended that the Law Commission and Parliament should bestow their attention to provisions that enable frustrating successful execution. The Court opined that the Law Commission or Parliament must give effect to appropriate recommendations to ensure such amendments in the Code of Civil Procedure, 1908, governing the adjudication of a suit, so as to ensure that the process of adjudication of a suit be continuous from the stage of initiation to the stage of securing relief after execution proceedings. The execution proceedings which are supposed to be a handmaid of justice and subserve the cause of justice are, in effect, becoming tools which are being easily misused to obstruct justice.

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41. Having regard to the above background, wherein there is urgent need to reduce delays in the execution proceedings we deem it appropriate to issue few directions to do complete justice. These directions are in exercise of our jurisdiction under Article 142 read with Article 141 and Article 144 of the Constitution of India in larger public interest to subserve the process of justice so as to bring to an end the unnecessary ordeal of litigation faced by parties awaiting fruits of decree and in larger perspective affecting the faith of the litigants in the process of law.”

24. Thus, this Court finds that the learned court rightly rejected the Misc Case. The Misc Case was an abuse of the process of court and total misuse of the provisions of law. Allowing the same would be a travesty of justice. The execution cannot be stalled by such mala fide and vexatious applications.

25. Under such circumstances, the revisional application is dismissed. CAN 1 of 2022 stands disposed of accordingly.

26. There will be no order as to costs.

27. Parties are directed to act on the server copy of this judgment.

(Shampa Sarkar, J.)