

21.08.2023
Court No. 19
Item No.15
CP/SB

C.O. 892 of 2023
Smt. Tara Sinha & ors.
Vs.
Smt. Ava Rani Paul & ors.

Mr. Subhrendu Halder
Mr. Abhirup Halder

...for the petitioners.

The revisional application has been filed challenging an order dated January 17, 2023, passed in Misc. Appeal No. 245 of 2022, by the learned Additional District Judge, Fast Track, 5th Court at Alipore. The Misc. Appeal was filed against an order dated July 22, 2022, passed by the learned Civil Judge (Junior Division), 1st Court, Alipore in Misc. Case No. 23 of 2022. Misc. Case No. 23 of 2022 was an application under Section 47 of the Code of Civil Procedure which was rejected by the executing court. The Misc appeal was preferred.

The plaintiffs had instituted Title Suit No. 360 of 2003 before the learned Civil Judge (Junior Division), 1st Court, Alipore. The suit was for declaration and recovery of possession of an encroached area measuring about 120 sq. ft. A learned commissioner was appointed and the learned commissioner found encroachment. The encroachment was over 103 sq. ft. delineated in red

border in the map prepared by the commissioner. The learned Civil Judge decreed the suit on contest granting recovery of possession from the entire 120 sq. ft. The first appeal was dismissed by the learned District Judge at Alipore on contest. The second appeal preferred before the High Court was also dismissed. The decree attained finality.

The decree holder put the decree into execution by filing Title Execution Case No. 67 of 2018. In connection with the said Execution Case, an application under Section 47 of the Code of Civil Procedure was filed which was registered as Misc. Case No. 23 of 2022. In the Misc. Case, the judgment debtor contended that the trial court did not adhere to the report of the commissioner and decreed the suit in respect of 120 sq. ft. instead of 103 sq. ft. as depicted in the learned commissioner's report.

The learned Additional District Judge held that although Commissioner's report indicated encroachment of 103 square feet, the Commissioner was examined on oath and the trial court accepted the plaint case, instead of totally relying on the Commissioner's report.

The misc. case was dismissed on the ground that the executing court could not alter, verify or correct the terms and conditions of the decree.

The decree of the trial court had attained finality as the appeal preferred by the petitioner was dismissed up to the High Court.

The direction upon the defendant to demolish the illegal structure on Schedule B property by decreeing the suit and granting the plaintiff recovery possession from the entire Schedule B property had been affirmed in the first appeal as also in the second appeal.

At the stage of execution, the judgment debtor could not take a plea that the demolition should be directed only in respect of the 103 sq. ft. as per the Commissioner's report and not over the entire B Schedule property which comprised of 120 sq. ft.

The trial court had accepted the plaint case upon evidence. The Commissioner also was examined, but the learned trial court found on evidence that the plaintiffs were successful in proving encroachment over the entire B Schedule property. Such finding of the fact was upheld at every stage of the suit.

Hence, the executing court could not go behind the decree and modify the decree by directing demolition from a part of the B Schedule property. The learned executing court rightly rejected the misc. case and the learned lower appellate court also

committed no mistake. The revisional application fails.

The decision of the Hon'ble Apex Court of Madras in A. Rajnish. Vs. T. P... reported in **2021 Supreme (Mad) 1991** does not apply in the facts of this case, although emphasis has been placed on paragraph 21 of the said decision.

The decision was rendered in completely different facts and circumstances. It was held that in case of violation of an order of injunction, the inherent power could be invoked to set aside the wrong and do the right, as it was the duty of the court as a policy not to perpetuate a wrong doing. Such an order applies to cases where an order of injunction is violated by a party or a party does not comply with certain directions passed in the ad interim stages of the suit.

In the case in hand, the suit was decreed in its final form directing demolition of the structures on B Schedule property, upon the court coming to the finding on evidence before it, that the encroachment was in respect of the entire B Schedule property. Such finding of the trial court was upheld in the first appeal as also in the second appeal.

Thus, the facts are distinguishable and the executing court, under no circumstances, could

reappreciate the evidence and hold that the trial court was wrong in directing recovery of possession from the entire B Schedule property.

The revisional application is thus dismissed.

There shall be no order as to costs.

Parties are to act on the server copy of this order.

(Shampa Sarkar, J.)