

13.06.2023
Court No. 19
Item no.08
CP

C.O. 1202 of 2023

Golam Hossain Sardar
Vs.
Md. Nizamuddin & anr.

Mr. Pinaki Ranjan Mitra
.....for the petitioner.

Mr. Uddipan Banerjee
Mr. Sumanta Sanyal
....for the opposite parties.

The revisional application has been filed challenging an order passed by the learned Civil Judge (Junior Division), 2nd Court, Howrah in Misc. Case No. 104 of 2017. By the order impugned dated February 17, 2023, the Misc. Case was disposed of without any orders in favour of the petitioner.

In the Execution Case being Title Execution No. 62 of 2017, the petitioner filed an application under Section 47 read with Section 151 of the Code of Civil Procedure. In Title Appeal No. 57 of 2013, the learned lower appellate court modified the order of the learned Trial Judge and decreed the counter claim to the extent that the opposite parties/defendants in the suit got a decree for eviction against the plaintiff/petitioner only in respect of the property described in the schedule of the counter claim. The plaintiff was directed to vacate

the property described in the counter claim of the defendant and hand over peaceful possession of the same to the defendant within 90 days from passing of the order.

On the basis of the decree of the learned lower appellate court, Title Execution Case No. 5 of 2013 was withdrawn and Execution Case No. 62 of 2017 was filed. The schedule of the property in the counter claim which was decreed in favour of the defendants, is as follows:

“One tile shed room situated within holding No. 16/1, Danesh Molla Lane, P.S. – Sibpur, District – Howrah which is butted and bounded during the course of execution are as follows:-

East: Room of late Ahmed Hossain and late Belat Hossain;

West: House of Hazi Nasiruddin and house of Ukil Khan;

North: House of late Jamal Molla;

South: Danesh Molla Lane.”

The petitioner filed an application under Section 47 read with Section 151 of the Code of Civil Procedure praying for proper determination as to whether the aforementioned schedule property in the counter claim, was in existence or not and upon proper assessment of the exact identity of the decretal property, the execution case should be proceeded with. The application was registered as Misc. Case No. 104 of 2017 and the same was dismissed. The learned executing court held that the petitioner was only trying to delay the execution.

The learned Court observed that it was a matter of public policy and a policy of law that there should be a finality to litigation. Multiplicity of litigation would not enure to the benefit of the decree holder and the judgment debtor should not be encouraged to delay the fruits of a decree. Accordingly, without addressing the question raised in Section 47 as to the non existence of the tile shed room and a ascertainment of the same by demarcation and identification of the alleged tile shed structure at Premises No. 16/1, Danesh Molla Lane, the court held that the decree holder could not be prevented from executing the decree and the Misc Case, was liable to be dismissed.

Having perused the order under revision, this court is of the view that as the contention of the petitioner was that the decree was inexecutable, the prayer of the petitioner for identification and demarcation of the alleged tile shed room at Plot No. 16/1, Danesh Molla Lane ought to have been decided on merits. The learned court below refrained from doing so.

Under such circumstances, the order impugned is set aside. The Misc. Case No. 104 of 2017 shall be heard afresh after obtaining a report from a learned advocate commissioner.

In the matter of ***Hindustan Petroleum Corporation Ltd. vs. Ajay Bhatia*** reported in **2023 (1) ICC 433 (S.C.)**, the Hon'ble Apex Court held as follows:-

“50. In ***Pratibha Singh vs. Shanti Devi Prasad*** reported in **(2003) (1) ICC (S.C.) 792**, this Court held that when a suit for immovable property had been decreed but the property not definitely identified, the defect in the Court record caused by overlooking of provisions contained in Order 7 Rule 3 and Order 20 Rule 3 could be cured. The Court which passed the decree could supply the omission. Alternatively, exact description of the decretal property might be ascertained by the Executing Court, as a question relating to execution, discharge or satisfaction of decree within the meaning of Section 47.”

In the matter of ***Gurram Anantha Reddy v. Katla Sayanna*** reported in **2015 SCC OnLine Hyd 151** the Hon'ble Court held as follows:-

“20. In *Chakka Ranga Rao v. Molla Mustari Banu*, wherein it is held in paragraph Nos. 4 to 6 as follows:

4. Since it is well known that Executing Court can look into the plaint for understanding the decree, I have requested the learned Counsel for the revision petitioner to produce a certified copy of the plaint. The learned Counsel produced a certified copy of the plaint. The averments in the plaint show that the portion shown as A.B.C.D. and E.F.G.H. in the plan attached thereto belongs to the plaintiff and that the portion shown as B.E.G.D. in that plan belongs to defendant. The case of the respondent (plaintiff) is that the revision petitioner (defendant) who has property in between his two plots had, while constructing his house encroached into the sites belonging to him, which are shown as A.B.C.D and E.F.G.H. Unfortunately, the plaint plan does not

contain measurements of the sites belonging to the parties, but the area of the portions marked as I.J.K.L. and M.N.O.P therein is shown as 5 Sq. yards each with rough measurements. It is difficult to identify those particular portions, because, distances from the eastern and western boundary of the plots belonging to the plaintiff, to locate them are not mentioned in the plaint plan.

5. The Court below was in error in dismissing the petition on the assumption that the provisions of Order 26 do not apply to proceedings in executing, because Order 26 Rule 18-A, clearly lays down that the provisions of that order also apply to proceedings in execution of a decree or order.

6. Here I feel it appropriate to refer to the observations of the Apex Court in Prathiba Singh v. Shanti Devi Prasad of its judgment reading ...Afterall a successful plaintiff should not be deprived of the fruits of decree. Resort can be had to Section 152 or Section 47 CPC depending on the facts and circumstances of each case - which of the two provisions would be more appropriate, just and convenient to invoke. Being an inadvertent error, not affecting the merits of the case, it may be corrected under Section 152 CPC by the Court which passed the decree by supplying the omission. Alternatively, the exact description of decretal property may be ascertained by the Executing Court as a question relating to execution, discharge or satisfaction of decree within the meaning of Section 47 CPC. A decree of a competent Court should not, as far as practicable, be allowed to be defeated on account of an accidental slip or omission....

In this case, since the dispute is with regard to the actual area encroached by the defendant, it would be appropriate to appoint an Advocate Commissioner to take measurements of the portions shown as A.B.C.D and E.F.G.H in the plaint plan, with reference to the title deeds dated 11-8-1977 and 10-4-1980 of the respondent (plaintiff) and also the title deeds of the

revision petitioner (defendant) under which he acquired B.E.G.D portion of the plaint plan, with the help of a qualified Surveyor. If the areas and portions purchased by the respondent and revision petitioner are identified, localized and demarcated, the area encroached by the revision petitioner into the site belonging to the respondent can easily be known. So it is just and expedient to appoint a Commissioner as such appointment serves the interest of justice.

The petitioner shall be at liberty to pray for appointment of a learned advocate commissioner in order to make local investigation at his own cost. The learned executing court shall allow such prayer by appointing a learned Advocate Commissioner.

The learned advocate commissioner shall cause identification and demarcation of the tile shed room as described the counter claim and in respect of which the decree was obtained by the defendants in the Misc Appeal.

Upon such identification, and demarcation, a report shall be prepared and filed before the learned court below. If the property cannot be demarcated and identified as a separate property from the pucca structure standing on 16/1, Danesh Molla Lane as categorically urged by Mr. Mitra, learned advocate for the petitioner, then a report of such nature mentioning such fact shall be filed. Thereafter, the learned court below shall proceed with the hearing of

the Misc. Case and pass necessary orders, in accordance with law.

As there is no other order from a superior forum with regard to the findings of the learned lower appellate court, the proceedings in the execution case shall continue upon determination of the above issue and the decree shall be reached to its finality upon disposal of Misc. Case No 104 of 2017, strictly in accordance with law, if the decretal property is identified.

The application shall be filed by the petitioner within two weeks from the date.

The learned court below shall appoint the learned advocate commissioner within a week thereafter. The learned advocate commissioner upon notice to the parties, shall conduct the investigation and file a report in the executing court within a month from appointment. The Misc. Case No. 104 of 2017 and the entire execution proceeding, thus, shall be disposed of within two months from date of receipt of the report.

Non-compliance of this order by the petitioner, shall permit the learned court below to continue with the execution.

The revisional application is accordingly disposed of.

There shall be no order as to costs.

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

(Shampa Sarkar, J.)