

July 11, 2023
Sl. No.9
Court No.19
s.biswas

CO 1325 of 2022

Madan Chandra Paul
vs.
Smt. Malina Mondal

Mr. Shambhunath Ray
Ms. Amrita Tewari
Ms. Sonia Das
Ms. Tuhina Parvin

... for the petitioner

Ms. Somoshree Saha

... for the opposite party

The revisional application has been filed against an order dated April 8, 2022 passed by learned Civil Judge (Junior Division), 5th Court, Alipore, South 24 Parganas in Misc. Case No.83 of 2017 arising out of Title Execution Case No.5 of 2004. The Misc. Case No.83 of 2017 is an application under Section 47 of the Code of Civil Procedure.

The petitioner contended that the decree could not be executed and the Title Execution Case No.5 of 2004 should be dismissed on the ground that deed of gift dated September 5, 1986 executed by the father of the plaintiff and the defendant, had not been acted upon. The fact that the defendant was allowed to continue to reside in the premises as a licensee was also not correct. In the plaint, the date of grant of such leave and licence in favour of the defendant, by the plaintiff, had not been mentioned. The fact that other persons were also residing in such premises had not been disclosed. The evidence of PW1 was not enough for passing a decree in the

suit for recovery of khas possession upon eviction of a licensee. As both the plaintiff and the defendant were heirs of Late Satish Chandra Paul, the relationship between the two should have been determined before the decree of eviction was passed.

The petitioner also wanted to incorporate certain facts by way of an amendment in the Misc. Case No.83 of 2017.

The learned court below rejected the Misc. Case No.83 of 2017 along with the application for amendment, inter alia, holding that the earlier application under Section 47 of the Code of Civil Procedure being Misc. Case 33 of 2005 filed by the petitioner under Order 21 Rule 97, 99,100 and 101 read with Section 47 of the Code of Civil Procedure had been rejected. Upon evidence adduced by both the parties and upon consideration of the documents, the learned court below was pleased to dismiss the earlier misc case, negating the contentions of the judgment debtor with regard to the inexecutability of the decree.

The fact that the petitioner, as a plaintiff, also filed Title Suit No.178 of 2006 for declaration and injunction, and the suit, upon contested hearing, was dismissed with costs was also one of the grounds for rejection of Misc Case 83 of 2017.

The present misc. case had been instituted on the self-same grounds, which were already rejected by the executing court while disposing of the Misc. Case No.33 of 2005.

By an amendment, the petitioner wanted to introduce a new fact in the Misc Case 83 of 2017, with regard to execution of a Will. Such fact was not a part of the written statement filed in the Title Suit No.151 of 1992. No evidence was adduced on this point.

The learned court found that the decree had attained finality in 1993 and since then the decree holder has not been able to enjoy the fruits of the decree. The application under Section 47 of the Code of Civil Procedure was a futile attempt by the judgment debtor to delay the execution proceeding. The court found that such frivolous application should not be allowed as it would encourage a recalcitrant litigant to perpetuate the litigation, endlessly. The application was dismissed as it was specifically found that the said application was a classic example of abuse of process of court.

Mr. Ray, learned advocate appearing for the petitioner submits that the decree was obtained by fraud as the petitioner had not mutated her name in the records of Kolkata Municipal Corporation, although she had claimed to have done so. On such

ground alone, the decree being a nullity could not be executed.

Reliance has been placed on the property tax bill of the premises in respect of which the plaintiff claimed to be the owner, by virtue of a deed of gift from the father. Further reliance has been placed on the answer given by the Kolkata Municipal Corporation under the Right to Information Act as to who was the recorded owner. According to the petitioner, the recorded owner continued to be the late father. It has been mentioned that the property tax was paid in the name of the recorded owner Sri Satish Chandra Paul.

It appears from the plaint that Satish Chandra Paul who was the original owner, by a registered deed of gift dated September 5, 1986 had gifted the property to the opposite party. The property was described in Schedule-A of the plaint. The opposite party claimed to be the owner on the basis of such gift. The defendant was the full brother of the opposite party who was allowed to reside in respect of the two rooms with a common verandah, bath and privy, being Schedule B of the plaint. That the plaintiff was facing extreme hardship due to paucity of accommodation, hence the suit was filed for a decree of recovery of khas possession upon eviction of licensee.

In the written statement, the genuineness of the deed of gift was questioned. It was the specific case of defendant that the deed of gift had been obtained by fraud, misrepresentation and had not been acted upon. As the father was paralyzed for about eight to nine years prior to the execution of the gift deed, by taking advantage of the physical and mental illness of the father, the plaintiff had procured such deed of gift. That the plaintiff had not mutated her name in the records of the corporation. The name of the father continued in the records of the corporation.

Upon contested hearing, the suit was decreed. The petitioner filed an appeal. The petitioner was also unsuccessful in the appeal. There is nothing on record to show that the petitioner had approached the higher forum being aggrieved by the judgment and decree passed in the title appeal.

Misc. No.33 of 2005 was filed earlier on similar grounds in the same execution proceedings. The same was dismissed on contest. Title Suit No.178 of 2006 which was filed by the petitioner for declaration and permanent injunction, was also dismissed.

It appears that a probate proceeding is pending in respect of a will, which the parties are contesting. The same grounds are urged once again by the petitioner. All these questions were negated by the learned Executing Court upon evidence and upon

consideration of all the documents. By the second misc. case the petitioner sought to reopen the entire issue once again.

The learned court below was satisfied that the plaintiff had been able to prove her title in respect of the suit property and had also arrived at the conclusion that the petitioner was no more than a licensee in respect of the property in question. Hence, the decree for recovery of khas possession upon evicting the licensee was passed and upheld upto the first appeal. The said decree has not been upset by any other forum.

The contention of the petitioner with regard to the executability of the decree has been negated on evidence upon contested hearing once before. Such decision operates as a res judicata. It is also settled law that the principles of res judicata apply not only in respect of suits but also in respect of interlocutory proceedings in the same suit, between the parties.

In the decision of **S. Ramachandra Rao vs S. Nagabhushana Rao & Ors.** decided in **Civil Appeal No.- 7691 - 7694 OF 2022**, the Hon'ble Apex Court held as follows:-

“10. For what has been noticed and discussed in the preceding paragraphs, it remains hardly a matter of doubt that the doctrine of res judicata is fundamental to every well regulated system of jurisprudence, for being founded on the consideration of public policy that a judicial decision must be accepted as correct and that no person should be vexed twice with the same kind of

litigation. **This doctrine of res judicata is attracted not only in separate subsequent proceedings but also at the subsequent stage of the same proceedings.** Moreover, a binding decision cannot lightly be ignored and even an erroneous decision remains binding on the parties to the same litigation and concerning the same issue, if rendered by a Court of competent jurisdiction. Such a binding decision cannot be ignored even on the principle of per incuriam because that principle applies to the precedents and not to the doctrine of res judicata.”

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 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 representatives 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 it, 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.”

The question with regard to the genuineness of the deed of gift, the contention with regard to the execution of the same by the unwell father at the instance of the sister and the issue of fraud raised were part of the pleadings in the written statement. The decree had attained finality. These are not grounds justifying maintainability of an application under Section 47 of the Code of Civil Procedure. The question of nullity of a decree as discussed in *Vasudev Dhanjibhai Modi (supra)* can be raised in execution. Otherwise, if the decretal property cannot be identified or separated or ceases to exist by the time the suit attains finality, an objection in relation to the executability of a decree can be filed. Reference is made to the decision in ***Rajdeo Ram vs. Gita Rani Sarkar*** reported in **2011 SCC OnLine Cal 558**. The relevant portion is quoted below:-

“**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.”

In the decision of **Rahul S Shah vs Jinendrakumar Gandhi** decided in **Civil Appeal**

Nos. 1659-1660 of 2021, 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 *The General Manager of the Raja Durbhunga v. Maharaja Coomar Ramaput Sing* 14 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 @ Shub Karan Prasad Bubna v Sita Saran Bubna*¹⁵, wherein it recommended that the Law Commission and the Parliament should bestow their attention to provisions that enable frustrating successful execution. The Court opined that the Law Commission or the 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 (1871-72) 14 Moore's I.A. 605 (2009) 9 SCC 689 the stage of securing relief after execution proceedings. The execution proceedings which are supposed to be handmaid of justice and sub-serve 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.

42. All Courts dealing with suits and execution proceedings shall mandatorily follow the below-mentioned directions. The relevant paragraph No.10 has been quoted below:-

10. The Court exercising jurisdiction under Section 47 or under Order XXI of CPC, must not issue notice on an application of third-party claiming rights in a mechanical manner. Further, the Court should refrain from entertaining any such application(s) that has already been considered by the Court while adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during adjudication of suit if due diligence was exercised by the applicant.”

In this case, the judgment debtor has not been able to show why the decree should not be executed. The continuity of the name of the deceased father in the municipal record does not negate the decree of passed against the petitioner.

There is no scope for reopening of the issues at this stage. The learned court below rightly rejected the Misc. Case No. 83 of 2017.

With regard to the pending probate suit, the consequences of the final decision in such suit shall follow. A probate suit also does not decide title. In any event, a decree of 1993 for eviction of a licensee is sought to be executed. The judgment debtor has failed in his various attempts to stall the execution of such decree. This court finds no reason to pass any order to protect the judgment debtor under the facts and circumstances. The learned Court below is directed to expedite the execution of the decree.

The revisional application is thus dismissed.

(Shampa Sarkar, J.)

Later:

The petitioner prays for stay of the operation of the judgment and decree, which is considered and rejected.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Shampa Sarkar, J.)