

12.12.2023
Court. No. 19

C.O. No. 576 of 2023
Amarendra Nath Parui (since deceased), substituted by his
legal heirs Bejoya Lakshmi Parui & Ors.

Versus

Dr. Rajendra Nath Parui & Ors.

With

C.O. No. 1951 of 2023
Bejoya Lakshmi Parui & Ors.

Versus

Dr. Rajendra Nath Parui & Ors.

Mr. Indranath Mukherjee,
Mr. Saunak Bhattacharya

...for the Petitioners.

Mr. Arijit Bardhan,
Mrs. Pampa Dey (Dhabal),
Mr. Nikhil Kumar Gupta

...for the Opposite Parties.

Both these revisional applications being C.O. 576 of 2023 and C.O. No. 1951 of 2023 are heard analogously, as they are interconnected.

C.O. 576 of 2023 is an application challenging the order dated June 16, 2022, passed by the learned Civil Judge (Sr. Division), at Serampore, Hooghly in Misc Case No. 03 of 2022 arising out of Title Execution Case No. 02 of 2018.

The petitioner prayed before the learned executing court that the hearing of the Misc. Case

No.03 of 2022 be deferred as Special Leave Petitions from the orders of the High Court dismissing the appeals from the preliminary decree and final decree, were pending. Further prayer was made that the petitioner be allowed to cross-examine the partition commissioner. The learned court rejected both the prayers.

The court was of the opinion that the challenge of the petitioners to the final decree had failed in the High Court. The decree attained finality. The executing court could not go beyond the decree. The decree was not a nullity. The learned court discussed the relevant decisions of the Apex Court on the subject. The court held that the merits of the report of the partition commissioner had been assailed in the first appeal. The first appeal had been rejected. The report filed by the partition commissioner was made a part of the final decree. Thus, further challenge to the self-same report by allowing the petitioner to cross-examine the partition commissioner once again, was beyond the jurisdiction of the executing court. According to the learned court, the petitioners could not be allowed to traverse through the merits of the report of the partition commissioner, as the same would amount to assailing the final decree at the stage of execution. The

executing court could not allow a further adjudication on the merits of the final decree. The report of the partition commissioner was an integral part of the final decree.

While denying the opportunity to the petitioners to examine the partition commissioner, the court was of the view that the Misc Case filed under Section 47 of the Code of Civil Procedure should be heard on its own merits.

C.O. 1951 of 2023 has been filed by the petitioner assailing an order dated April 25, 2023 passed by the learned Civil Judge (Sr. Division), at Serampore, Hooghly, by which Misc case No.- 03 of 2022 (application under Section 47 of the Code of Civil Procedure) arising out of Title Execution Case No. 02 of 2018, was dismissed.

The learned court held that the Misc. case No.- 03 of 2022 was not maintainable on the facts and circumstance of the case. The learned court was of the opinion that the objections raised in the application under Section 47 of the Code of Civil Procedure were directed at the correctness of the report filed by the partition commissioner. According to the learned Court, as the said report had been upheld by a Division Bench of this Court in F.A.T No. 44 of 2018

and F.A.T No.- 170 of 2019. The decree attained finality. The Special Leave Petitions being SLP (C) No. – 18641-18642 of 2022, filed by the petitioner, challenging the judgments of the High Court had also been dismissed. Thus, the executing court was of the view that further challenge to the executability of the decree, once again, by assailing the report of the partition commissioner under Section 47 of the Code of Civil Procedure, was not permissible in law. The grounds taken in the application under Section 47 of the Code of Civil Procedure were primarily challenges to the report of the partition commissioner and to the final decree. The court denied a rehearing on the merits and demerits of the decree passed against the petitioners on the ground that such decree had been upheld by the High Court and the Hon'ble Apex Court did not interfere with the decisions of the High Court. The executing court refused to go behind the decree. The application under Section 47 of the Code of Civil Procedure was thus, rejected.

According to the petitioners, the orders suffer from the following irregularities:-

- a) Not a single finding had been returned with regard to the execution, discharge and satisfaction of the decree.

- b) The executing court should have accepted that the report of the partition commissioner was defective. Schedule A property had been wrongly divided, by allowing 1/9th share to each of the parties although, there were other co-sharers.
- c) Instead of allotting 2/9th share of the Schedule B property jointly to the defendants Nos. 1 and 2, the said defendants were allotted 1/9th share individually, resulting in inadequate space for construction of their dwelling units. The partition commissioner also exceeded his jurisdiction by dividing and demarcating the pukur (RS Plot No. 2155). The learned executing court had overlooked all such aspects.
- d) The opinion of the partition commissioner that allotment of the land could only be made upon demolition of the existing three storeyed residential building, was also incorrect. Such question went to the very root of the executability of the decree.
- e) The executing court ought to have held that Schedule C property was not a joint property. The same was not a part of the preliminary decree and should not be included

in the partition commissioner's report and divided amongst the parties.

Mr. Mukherjee, learned advocate for the petitioner submits that the petitioners were legally entitled to cross examine the partition commissioner especially in view of the defects and anomalies in such report. Reliance is placed on Order XXVI Rule 10(2) of the Code of Civil Procedure. It is submitted that the learned executing court could not have deprived the petitioners from exercising their right as per the Code of Civil Procedure. Learned Advocate vehemently contends that the commissioner's report could not be accepted without cross examination. The final decree should not have been passed without allowing cross-examination of the partition commissioner. It is further submitted that when the court itself recorded that the commissioner was the best person to understand the actual state of affairs in the subject property, the court should not have dismissed the Misc. Case without recording the evidence of the partition commissioner.

Pointing to the preliminary decree, it is submitted that shares had been declared only in respect of schedule A and schedule B properties. Schedule C was left out in the preliminary decree. While passing the preliminary decree, the trial court

had held that the evidence of PW1 indicated that schedule C property was a rented property of the plaintiffs and the defendants did not have any claim in respect of such property. According to the learned Advocate, the executing court should have decided whether the decree could be executed, satisfied and discharged in view of the various irregularities in the report and in the final decree.

Mr. Mukherjee also submits that the partition commissioner could not have administered oath to the parties. According to learned Advocate, Section 141 of Code of Civil Procedure mandated that all procedures provided under the Code of Civil Procedure, which were applicable to suits, were applicable in any miscellaneous proceeding before a civil court. The proceeding under Section 47 of the Code of Civil Procedure being a miscellaneous proceeding in a court of civil jurisdiction, the provisions of Order XXVI Rule 10(2) would be equally applicable. The learned executing court ought to have allowed the cross-examination of the partition commissioner in such miscellaneous proceeding.

According to Mr. Mukherjee, the property was also overvalued.

Mr. Bardhan, learned advocate appearing on behalf of the opposite parties submits that the preliminary decree was passed on October 1, 2015. Schedule -C was a part of the final decree. The commissioner's report was filed on June 19, 2017 and accepted on November 20, 2017. The final decree was passed on December 22, 2017. The report of the partition commissioner was made absolute and the commissioner's report was made a part of the final decree. Parties were directed to take possession of the suit property, according to their shares, on the basis of the partition commissioner's report within 90 days. Failing which, the final decree could be executed. In this case, the entire exercise was completed and the partition commissioner's report had been accepted and made a part of the final decree. The petitioners did not have any further right to cross-examine the partition commissioner. The final decree and the preliminary decree were challenged by the petitioners, by filing two separate first appeals and both the appeals were dismissed by the High Court. The Special Leave Petitions were also dismissed.

Mr. Bardhan further submits that in the appeal from the final decree, the grounds of challenge were the alleged anomalies and errors in the partition

commissioner's report, including the point of incorporation of schedule C property in the common hotch potch. Referring to the decision of the High Court passed in the first appeals, Mr. Bardhan submits that the High Court had upheld incorporation of Schedule C property in the final decree. The application under Section 47 of CPC was an appeal in disguise. All points which were raised in the first appeal, assailing the partition commissioner's report, were again reiterated in the application under Section 47 of the code.

Mr. Bardhan relies on the following decisions:-

(i) *Basanti Seal & Ors. vs Premlal Seal & Ors.*

reported in **2004 SCC Online Cal 481,**

(ii) *Brakewel Automotive Components (India) Pvt.*

Ltd. vs P.R.Selvam Alagappan reported in **(2017) 5 SCC 371,**

(iii) *Biswajit Samanta vs. Dhakuria Service*

Centre and Ors. reported in **2015 SCC Online Cal 6910**

What fall for adjudication by this court are:-

- (a) whether the prayer of the petitioners for cross-examination of the partition commissioner had been rightly rejected by the learned court below and;
- (b) Whether dismissal of the Misc case No. 03 of 2022,

being an application under Section 47 of the Code of Civil Procedure, was justified.

Admittedly, by order dated November 20, 2017 the report of the partition commissioner had been accepted and the written objection of the petitioners had been rejected. The learned Civil Judge (Sr. Division) Serampore, considered the grounds of challenge to the commissioner's report. The petitioners contented that the petitioners did not get a convenient plot of land to build their residence, and the manner in which the allotment of schedule B property had been made, it was apprehended that the plaintiffs would break down the building in future, which would cause difficulty to the defendants. Such objections were found to be meritless by the learned court.

Having perused the objections taken by the petitioners to the commissioner's report, it appears to this court that one of the main objections of the defendants/petitioners was that they were not getting a suitable plot to build their residence. According to Mr. Mukherjee, the commissioner ought to have maintained the existing occupation of the parties in the schedule B property, instead of dividing and demarcating the property in the manner shown in the report.

With regard to allotment of schedule B property as per commissioner's report, the objections raised by the petitioners had been rejected by the learned trial judge, when the commissioner's report had been accepted. Upon perusal of the report and the map filed by the commissioner, the court found that the defendants/petitioners had been allotted their share on a particular side of the suit property, having continuity. The same was also adjoining the municipal road. Hence, the apprehension of the defendants that the plaintiffs may breakdown the portion of the building allotted to them in future, could not be a ground for not accepting the commissioner's report. The commissioner's report was challenged in the first appeal preferred from the final decree, but the appeal was dismissed. Thus, there was no scope to reopen the issue, in the execution case.

The suit property consisted of schedule-A, schedule-B and schedule-C. Schedule A property was divided by allowing 1/9th share to each of the parties. The records do not indicate existence of other co-sharers. Such issue was never raised, either before the trial court or before the first appellate court by the petitioners. At this stage, the issue cannot be agitated.

The further contention that schedule C property was not a part of the preliminary decree and should not have been made a part of the final decree, was also negated by the Hon'ble High Court in the first appeals, i.e., F.A.T 170 of 2019 and F.A.T 44 of 2018.

The Hon'ble Division Bench recorded that the partition commissioner invited the parties to make their submissions and on the basis of the submissions of the parties, the properties were divided and placed before the learned trial judge for consideration. The defendants/petitioners raised two primary issues in the first appeal from the final decree. First objection was that the partition commissioner transgressed his jurisdiction by including schedule C property in the report and such report was erroneously accepted by the learned trial court. The second objection was that, although in the written statement the defendant raised the point of limitation, the same had not been taken into consideration.

The Hon'ble Division Bench held that upon considering the preliminary decree, it did not appear that the point of limitation had ever been raised. With regard to incorporation of schedule C, the Division Bench held that even though in the preliminary decree, shares of the parties in respect of schedule A

and B property had been declared at the time of commission, the parties invited the commissioner to record their submissions and consent to partition of schedule C property. On the basis of such submission, the partition commissioner incorporated and demarcated schedule C property. From the report of the commissioner, it appears that the defendant No. 1 and 2/petitioners made their submissions and put forward a proposal for allotment of schedule C property, along with the other properties.

The Division Bench came to the finding that the parties had themselves invited the partition commissioner to divide the schedule C property. The relevant portion of the report was quoted in the judgment.

Their Lordships observed that once the commissioner was invited to make allotment of schedule C property, it would be presumed that the parties had intended to have an amicable settlement of all the properties under their possession and or occupation. Moreover, schedule-C was also a part of the plaint.

The Hon'ble Division Bench also recorded the findings of the learned trial judge in the order by which the objection of the defendants to the report, had been

rejected. The relevant portion from the said order dated November 20, 2017 is quoted below:-

“On asking Ld. Advocate for the defendants as to why the defendants were not ready to accept the Commissioner's Report, Ld. Advocate for the defendants submitted that though the defendants have been allotted their share in the B schedule property and had been given allotment as per their choice, but the manner in which the allotment is made the defendants apprehend that the plaintiff may break down; the building in future, which will cause difficulty in the defendants residence in the suit property. Considered submission of Ld. Advocates of both sides.

Also gone through the Commissioner's Report and the map. I find that the defendants had been allotted their share from a side of the suit property continuous portion of the suit property and which is also adjoining to municipality road/ Only because the defendants apprehend that the plaintiffs in future may break down the portion of the building allotted to them cannot be a ground for non-acceptance of the Commissioner's Report.”

It appears that no objection was taken either for inclusion of the schedule C property in the commissioner's report or with regard to the point of limitation and division of schedule A property.

Thus, the Hon'ble Division Bench found that the points raised in the first appeal were all after thoughts. The appeals were dismissed with the following observations:-

“No objection whatsoever was raised at any point of time with regard to the inclusion of the 'C' Schedule Property or with regard to limitation issue. This is a clear afterthought with a view to disrupt the process of partition initiated following the preliminary decree. The final decree

also could not be implemented because of the pendency of this appeal. The conduct of the appellants are abominable and attempts have been made to mislead this Court by giving a wrong impression that parties have never intended to include 'C' Schedule Property not even before the Commissioner of partition. The record shows otherwise. Insofar as the point of limitation is concerned with regard to the suit for partition, the question of limitation does not arise. The said plea was never raised before the Trial Judge at the time of passing preliminary decree.

In view thereof, we affirm the final decree and dismissed both the appeals with costs assessed at Rs.10,000/- (Rupees Ten Thousand) to be paid by the appellants to the defendants within two weeks from this date.”

The petitioners filed Special Leave Petitions before the Hon’ble Apex Court. Those petitions were dismissed. Thus, the contention of the petitioners that the partition commissioner’s report had not attained finality and could be reconsidered upon allowing cross-examination, is not permissible in law and cannot be accepted. All the objections to the said report were ruled out by the Hon’ble Division Bench. In the application under Section 47 of the Code of Civil Procedure, further objections with regard to the report of the commissioner could not be raised. The grounds of appeal from the final decree are almost akin to the objections raised in the present Misc Case. The contention that the report of the commissioner did not mention any free passage of light, air, drainage system,

water etc., were also raised for the first time in the Misc case. The further point that the commissioner could have allotted rooms to the parties in a three storeyed building, instead of suggesting demolition, was also raised for the first time in the Misc. Case. None of these points were raised either in the objection filed by the petitioners to the commissioner's report or before the High Court.

This court is of the view that the defendants invoked the provision of Section 47 of the Code of Civil Procedure, to once again challenge the commissioner's report after having failed in the first attempt before the learned trial judge, in the second attempt before the High Court and finally before the Hon'ble Apex Court.

Thus, further challenge to the commissioner's report in the Misc case was only an attempt to re-open the challenge to the final decree. It was an appeal in disguise. The executing court rightly held that the court could not go beyond the decree which had attained finality and was binding between the parties. In the decision of ***Brakewel (Supra)***, the Hon'ble Apex Court held as follows:-

20. It is no longer res integra that an executing court can neither travel behind the decree nor sit in appeal over the same or pass any order jeopardising the rights of the parties thereunder. It is only in the limited

cases where the decree is by a court lacking inherent jurisdiction or is a nullity that the same is rendered non est and is thus unexecutable. An erroneous decree cannot be equalled with one which is a nullity. There are no intervening developments as well to render the decree unexecutable.

21. As it is, Section 47 of the Code mandates determination by an executing court, questions arising between the parties or their representatives relating to the execution, discharge or satisfaction of the decree and does not contemplate any adjudication beyond the same. A decree of court of law being sacrosanct in nature, the execution thereof ought not to be thwarted on mere asking and on untenable and purported grounds having no bearing on the validity or the executability thereof.

22. Judicial precedents to the effect that the purview of scrutiny under Section 47 of the Code qua a decree is limited to objections to its executability on the ground of jurisdictional infirmity or voidness are plethoric. This Court, amongst others in Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman [Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman, (1970) 1 SCC 670 : AIR 1970 SC 1475 : (1971) 1 SCR 66] in essence enunciated that only a decree which is a nullity can be the subject-matter of objection under Section 47 of the Code and not one which is erroneous either in law or on facts. The following extract from this decision seems apt: (SCC pp. 672-73, paras 6-7)

“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 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.”

23. Though this view has echoed time out of number in similar pronouncements of this Court, in *Dhurandhar Prasad Singh v. Jai Prakash University* [*Dhurandhar Prasad Singh v. Jai Prakash University*, (2001) 6 SCC 534 : AIR 2001 SC 2552], while dwelling on the scope of Section 47 of the Code, it was ruled that the powers of the court thereunder are quite different and much narrower than those in appeal/revision or review. It was reiterated that the exercise of power under Section 47 of the Code is microscopic and lies in a very narrow inspection hole and an executing court can allow objection to the executability of the decree if it is found that the same is void ab initio and is a nullity, apart from the ground that it is not capable of execution under the law, either because the same was passed in ignorance of such provision of law or the law was promulgated making a decree unexecutable after its passing. None of the above eventualities as recognised in law for rendering a decree unexecutable, exists in the case in hand. For obvious reasons, we do not wish to burden this adjudication by multiplying the decisions favouring the same view.”

I have considered the report of the commissioner and the manner in which the entire property was divided by metes and bounds, indicating the allotment of the respective shares. The meticulousness with which the commissioner had prepared the report with the maps and drawings is commendable. This court finds that the decree is capable of execution. The properties are distinct separate, demarcated and identifiable. Schedule A, B and C properties have been clearly depicted. The manner in which the same was supposed to be demarcated had been stated with immense clarity in the report. Measurements, drawings and maps were all part of the report.

The decree is also not a nullity. The decree does not either suffer from jurisdictional error or non-consideration of objections which were taken by the defendants in the suit. Apart from pointing out the inconvenience that may be caused to the defendants in view of the allotment of B schedule property and incorporation of C schedule property, no case has been made out either with regard to the inexecutability of the decree or impartibility of the properties.

In the matter of ***Dhurandhar Prasad Singh v. Jai Prakash University***, reported in **2001 (6) SCC 534**, the Hon'ble Apex Court observed that exercise of

powers under Section 47 of the Code of Civil Procedure was microscopic. The executing Court could allow objections under Section 47 of the Code of Civil Procedure in respect of the executability of the decree, if it found that the same was either void ab initio and a nullity, or the decree was not capable of execution either because the same was passed in ignorance of a provision of law or a law had been promulgated, making the decree unexecutable after its passing.

This court finds that the Misc case was rightly rejected and delay has been unnecessarily caused in the execution.

In the decision of ***Bhoj Raj Garg vs. Goyal Education and Welfare Society & ors.*** decided in ***Special Leave Appeal No.19654 of 2022***, the Hon'ble Apex Court held as follow:-

“The complaint of the petitioner is that the Execution Court is not abiding by the directions issued by this Court in the decision in ***Rahul S. Shah Vs. Jinendra Kumar Gandhi & Ors.***, reported in ***(2021) 6 SCC 418***. In the said decision, it was held as follows:-

‘42. All Courts dealing with suits and execution proceedings shall mandatorily follow the below mentioned directions:-

2. The Executing Court must dispose of the Execution Proceedings within six months from

the date of filing, which may be extended only by recording reasons in writing for such delay.’ This means that it becomes the duty of the Execution Court to dispose of the execution proceedings at the earliest and since this Court has directed that the Execution Court must dispose of the execution proceedings within six months from the date of filing, which can be extended only by recording reasons in writing for such delay, this direction is meant to be observed. This would mean that every effort should be made to dispose of the execution petition within the said time limit and the Execution Court should have reasons for not being able to dispose of the execution petition. The Execution Court is duty bound to record reasons in writing when it is unable to dispose of the matter.”

In **Rahul S. Saha (supra)**, it had been categorically held that execution cases should be completed expeditiously. The Hon’ble Apex Court noted the sorry state of affairs and how the provisions of law were being misused to delay execution proceedings.

Under such circumstances, this court does not find any reason to interfere with the order impugned. Scope of interference under Article 227 of Constitution of India, is limited. The learned executing court did not commit any error. The order impugned does not suffer from any irregularity. The order has not been passed

in ignorance of law. The learned court assigned cogent reasons as to why the application under Section 47 of the Code of Civil Procedure should fail. The execution must be expedited, as the decree holders cannot suffer unnecessarily. They are entitled to enjoy the fruits of the decree.

Under such circumstances, the revisional applications are dismissed.

There will be no order as to costs.

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

(Shampa Sarkar, J.)