

April 30, 2024
Sl. No.42
Court No.19
s.biswas

CO 1488 of 2024

Malay Ghosh

vs.

Smt. Sandhya Mallick and another

Mr. Nilendra Narayan Ray

... for the petitioner

1. The revisional application arises out of an order dated April 12, 2024 passed by the learned Civil Judge (Junior Division), 3rd Court at Serampore, Dist. Hooghly, in Misc. Case No.39 of 2024. The said order was passed in Title Execution Case No.49 of 2019. Misc. Case No.39 of 2024 was an application under Section 47 of the Code of Civil Procedure. By the said application, the petitioner for the third time challenged the executability of the decree passed in Title Suit No.154 of 1996.
2. The petitioner tried to bring on record an alleged sale deed dated September 27, 2024 by which the father of the petitioner allegedly purchased a part of the decretal property. Thus, the petitioner claimed to be the son of the owner of the property and submitted that the decree could not be executed.
3. The learned court, upon going through the entire facts, arrived at the following conclusions:
 - a) The present application being Misc. Case No.39 of 2024 was filed on April 8, 2024 and

the same was not maintainable, being hit by the principle of res judicata;

- b) Upon perusal of the entire records, it appeared that prior to filing of misc. case, another misc. case being Misc. Case No.25 of 2020 under Section 47 of the Code of Civil Procedure challenging the executability of the decree had been filed. The said application was rejected vide order dated February 21, 2022 on contest;
 - c) Again, the petitioner filed another misc. case being misc. case No.29 of 2022 under Section 47 of the Code of Civil Procedure, challenging the executability of the decree. The misc. case was rejected on November 24, 2022.
 - d) The Misc. Case No.25 of 2020 and misc. case No.29 of 2022 were filed on other grounds, but the issue of sale was not raised. Again, with the contention that the father had ownership rights, the third Misc. Case was filed. The petitioner contended that as he was a minor at the relevant time, he could not bring the deed to the notice of the court.
4. In my view, such contention of the petitioner was available to him when the Misc. Judicial Case No.25 of 2020 and 29 of 2022 had been filed. In those applications, there was no whisper about

such transfer of ownership of the decreetal property in favour of the petitioner's father. The petitioner contended that as minor he did not have any knowledge about the transfer. The learned court specifically came to the finding that when the other two applications under Section 47 had been filed, the petitioner had already attained majority.

5. During the entire trial of the misc. cases being nos.25 of 2020 and 29 of 2022, the petitioner had never raised any defence, claiming transfer of the ownership of the property wayback in 2004. The petitioner had attained majority when the misc. cases were filed by him.
6. Therefore, the last application was barred not only by the principles of res judicata, but also constructive res judicata. In the earlier misc. case the court held that the decree was executable. Thus, such decision will operate as res judicata. Principle of res judicata applies to subsequent stages of the same proceeding.
7. The Misc. Case is 39 of 2024, is also hit by the principles of constructive res judicata as such point was available to the petitioner earlier, but was not raised in the earlier misc. cases.
8. 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.”

9. The learned court relied on the decision of the Hon'ble Apex Court and specifically stated that Section 47 of the Code of Civil Procedure, could not be misused for the purpose of denying the decree holder the fruits of the decree.

10. In the earlier round of litigation with regard to the misc. cases filed under Section 47 of the Code of Civil Procedure, all the questions raised by the petitioner had been comprehensively discussed and all questions had been answered. The learned court was of the view that there was no impediment in the execution, discharge and satisfaction of the decree. Therefore the questions could not be reagitated in the third round of litigation under the same provision of law by filing another application under Section 47 of the Code.

11. In case of ***Pradeep Mehra Vs Harijian J. Jethwa (since deceased thr. lrs.) & ors.*** reported in **2023 INSC 958** the Hon'ble Apex Court has clearly held as follows :-

"...the principles of res judicata are not only applicable in respect of separate proceedings but the general principles of res judicata are also applicable at the subsequent stage of the same proceedings

and therefore the same court will be precluded to go into that question which has already been decided, or deemed to have been decided by it in the earlier stage. In other words, it will be barred by the principle of res judicata, or at least by the principle of constructive res judicata. The logic here is that an execution proceeding works in different stages and if the judgment debtors have failed to take an objection and have allowed the preliminary stage to come to an end and the matter has moved to the next stage, the judgment debtors cannot raise the objection subsequently, and revert back to an earlier stage of the proceeding."

12. Moreover, the judgment and decree was upheld in the title appeal which was passed in 2019, when the petitioner was a major.
13. Under such circumstances, this court does not find any reason to interfere with the order impugned. The order impugned is well-reasoned.
14. 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.”

15. 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.

16. The revisional application stands dismissed accordingly.

17. There shall be no order as to costs.

(Shampa Sarkar, J.)