

Item No.3
03.05.2024
Court. No. 19
GB

C.O. 1535 of 2024

Santosh Chakraborty
Vs.
Ujjal Chakraborty & Ors.

Ms. Sormi Dutta

... for the Petitioners.

1. The revisional application arises out of an order dated January 25, 2024, passed in Misc. Case No.11 of 2023 arising out of Title Execution Case No.2 of 2015. The execution case is pending before the learned Civil Judge (Junior Division), 2nd Court at Bolpur, Birbhum. The Misc. Case No.11 of 2023 was dismissed by the learned court on the following grounds:-

- a) This was the second application under Section 47 of the Code of Civil Procedure, challenging the executibility, discharge and satisfaction of the decree.
- b) The decree had been affirmed upto the High Court.
- c) The question with regard to the identity of the property had already been decided in the first appeal preferred by the petitioner. The petitioner was unsuccessful on all points, including the question raised

under Order 7 Rule 3 of the Code of Civil Procedure.

- d) By filing the misc. case, the petitioners wanted to reopen the issues, which were already decided and lastly,
- e) The issues were available to the petitioners at the stage of moving the first application under Section 47 of the Code of Civil Procedure, which the petitioners chose not to do. Thus, the second application was also barred by the principles of constructive res judicata

2. The learned advocate appearing on behalf of the petitioners submits that the schedule of the plaint did not disclose clearly the exact position of the property in the possession of the petitioner/judgment debtor. Unless the property was properly identified, execution would not be possible. The provisions of Order 7 Rule 3 read with Order 20 Rule 9 of the Code of Civil Procedure amply clarified that description of the immovable property should be mentioned in detail and execution was not possible if the property could not be clearly identified. Such defect could be looked into by the execution court. On such ground, a decision of the Hon'ble Apex Court has been relied upon, namely, ***Pratibha Singh and Others versus***

Shanti Devi Prasad and Others reported in ***MANU/SC/1098/2002***.

3. The suit was filed by one Rabindranath Chakraborty, the predecessor of the opposite parties, for eviction of a licensee against the petitioner. The plaint case was that the suit property originally belonged to one Bibhuti Bhusan Chakraborty, who purchased the same in the year 1934. The petitioner is the son of Rishipati Chakraborty. Over the said property, the father of the original plaintiff constructed a room and used to run a shop, selling tea and snacks. He died in 1967. The said shop room was closed for a while. Thereafter, Rishipati Chakraborty requested Rabindranath Chakraborty for a permission to run the said shop on condition to quit and vacate the same as and when asked. Since the month of Baishakh and Jaisthya, 1409 the predecessor of the opposite parties requested the father of the petitioner to quit and vacate the property, but he refused to do so. The petitioner as defendant no.1, contested the suit by filing his written statement denying the material allegations levelled against him. Main contention was that the suit property was an ancestral property of the father of the petitioner and the property was purchased on October 10, 1934 from one Jiban Krishno

Bandopahdyay in the name of Bibhuti Bhusan Chakraborty. The name of the petitioner's father was recorded in the C.S. record of rights. Subsequently, the property was amicably partitioned between the brothers and Raghupati Chakraborty and Bibhuti Bhusan Chakraborty gave up their shares in favour of the father of the petitioner. The father of the petitioner became the owner and possessor of the suit property for more than 12 years, and was running the shop.

4. The learned court framed several issues and came to the finding that ownership could not be proved by the defendant No.1/petitioner. The defendant No.1 also failed to prove that the suit was bad for non-joinder of parties. On the other hand, the plaintiffs had successfully proved their title over the suit property by producing the title deed of their predecessor Bibhuti Bhusan Chakraborty. They also produced tax receipts and khajna dakhilas issued in the name of their predecessor. The defendant No.1 also failed to establish the plea of amicable partition as averred in the written statement.
5. Therefore, in the light of the aforesaid facts and circumstances, the learned court was of the considered view that the suit for eviction of licensee was proved. Allowing permissive possession and

granting a license to a relative to occupy a particular property, was not required to be accomplished by way of a document. Accordingly, the suit was decreed.

6. The petitioner preferred a first appeal before the learned Additional District Judge, Bolpur. The learned additional District Judge dismissed the appeal upon considering all the issues raised by the petitioner. The point which has been raised in the second application under Section 47 of the Code of Civil Procedure, was raised in the first appeal, with regard to mis-description of the property. The learned court recorded the submissions of the petitioner as follows:-

“It is further argued that the suit property is vague. No effecting (sic effective) decree can be passed on the basis of such vague description. The entire suit property having an area of 8 decimals of land, out of which the plaintiffs/respondents have sought for eviction in respect of four decimals of land. The suit is bad under Order 7 Rule 3 of the CP Code.

It is further argued that the plaintiffs/respondents have not been able to prove any incident of permissive possession. According to Ld Advocate for appellant the suit should have been dismissed by Ld Trial Court.”

7. The learned appellate court also recorded the submission of the plaintiffs as follows:-

“Per contra, Ld Advocate for the respondents submits that the episode of eviction suit brought against the

defendant/appellant by some Das is nothing but Cock and Bull story. There is no pleading to that effect. Even if it is presumed that a suit for eviction was brought against the appellant by some Das, it has got nothing to do with the plaintiffs/respondents. The said Judgment if at all exists, is a Judgment in personem and not a Judgement in rem. It is further contended that the plaintiffs/respondents have proved their title in respect of the suit property, Ext.4 is the document. There is nothing to prove that the father of the defendant/appellant acquired right, title, interest in respect of the suit property. He is not possessing the property as tenant under the plaintiff/respondent nor he is possession the same as trespasser. Therefore, his status is nothing but a licensee and the license has been revoked.”

8. Upon careful consideration of the pleadings, the learned appellate court came to the following findings:-

“I have carefully perused the pleadings of the parties as well as evidence on record. In paragraph 8 of the written statement the defendant/appellant has clearly admitted that the suit property was purchased from Jiban Krishno Bandopadhyay in the name of Bibhuti Bhushan Chakraborty, Bibhuti Bhusan Chakraborty was the father of the original plaintiff – Rabindranath Chakraborty. This averment in the written statement supports the Case of the plaintiffs/respondents regarding their ownership. When the defendant/appellant wishes the Court to believe that the property was purchased in the name of Bibhuti Bhusan Chakraborty by all the 3 brothers and father of the defendant by virtue of amicable partition acquired absolute ownership in respect of the suit property, under Section 103 of the Evidence onus lies upon the appellant/defendant to prove the same. But I have no hesitation to say that the

appellant has not been able to discharge such onus.

A man can possess a property, either as owner or as tenant/licensee or as a trespasser. Ownership of the property is with the respondents and they never claimed the appellant to be their tenant but according to the respondents they granted leave & license to the defendant. No formal document is required to grant leave and license under the Law and no formal notice is also required to revoke the license. Therefore, I do not find any reason to be in agreement with the Ld Advocate for the appellant that there is no incident of permissive possession.

The defendant/appellant is well aware of the extent of property, he has been possessing and it is clear to him from which property his eviction has been sought for.

I do not find any reason to hold that the suit is defective for want of proper description of the suit property.”

9. Thus, the appeal was dismissed. The said judgment and decree of the appellate court was carried before this Court by a second appeal. The appeal being SAT 25 of 2015 was dismissed by the High Court. Thus, the order of the trial judge stood affirmed upto the High Court.
10. The petitioner filed an application under Section 47 of the Code of Civil Procedure, inter alia, challenging the executibility of the decree on various grounds. Such application was rejected on contest. At that stage, the petitioner carefully omitted to raise the question which has been raised in the second application under Section 47 of the Code.

11. Thus, I agree with the learned executing court that the second application was barred by the principles of constructive res judicata. I also hold that once the executibility of the decree had been challenged and the decree had been found to be executable in law, the said decision would operate as res judicata in any subsequent application filed once again, challenging the executibility of the same decree. The Code does not envisage multiple applications under Section 47, challenging the executibility of a decree on one ground after another.

12. 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.”

13. With regard to the identity of the property, the schedule of the plaint categorically states that the over eight decimals of land, there was a construction and a tea shop was being run and occupied by the petitioner. The predecessor of the

petitioner was running his business of tea and snacks from the said shop. The petitioner is claiming the same. The petitioner is well aware of the identity and extent of the property under his occupation. There will be no difficulty in identifying the decretal property. The schedule of the plaint clearly mentions the existence of the tea shop in the property in question. Moreover, the learned court of first appeal has already dealt with such aspect and negated the claim of the petitioner.

14. Now, the petitioner urges that a construction was raised on four decimals out of eight decimals and neither the plaint nor the decree talks about the exact position or the area in occupation of the petitioner. The petitioner submits that the shop room was initially on the entire property. Subsequently, a part of the property was sold and the nature and character of the property had undergone a change. This submission is not a part of the pleadings in the written statement. This point with regard to change in the character of the property and sale of a part of the property to third parties was already taken by the petitioner in the first application under Section 47 of the Code of Civil Procedure, which was rejected by the court, upon coming to a specific finding that the decree could be executed.

15. The identity of the property is now more specific, going by such submissions. In any event, the parties proceeded for eviction of a licensee from the particular shop room. The defence case was that the father of the defendant/petitioner had acquired right, title and interest in respect of the shop from his brothers.
16. Under such circumstances, any further resistance towards the execution of the decree, is only a desperate attempt on the part of the petitioner to stall the execution. This cannot be encouraged. The questions of res judicata and constructive res judicata have been elaborately discussed by the learned executing court. The learned executing court has applied the law with regard to the scope of execution of a decree. The learned court rightly held that the learned first appellate court had specifically recorded that when the petitioner was aware of the extent of the property which the petitioner was occupying and in respect of which the eviction was prayed for, the question of further identification of the property would not arise. Both the parties are aware of the position of the shop room which was being run by the predecessor of the petitioner and from which the petitioner was sought to be evicted.

17. In the decision relied upon in the matter of Pratibha Singh (supra), the Hon'ble Apex Court was of the view that the sub-plots involved in the decree to be executed could not be identified by mere boundaries as the plot numbers and boundaries did not appear either in the records of settlement or the survey. The plaintiff ought to have filed a map of the suit property along with the plaint for proper identification.
18. I find that the said judgment does not apply to the facts of this case as the plaint has categorically stated that the construction on the eight decimals of land on which there was a construction from which a tea shop had been operated by the father of the defendant/petitioner. The petitioner was sought to be evicted from the suit property. So, the eviction of the defendant from the suit property could easily be achieved and it would not be difficult to identify the tea stall/shop in the suit property.
19. The petitioner is only trying to abuse the process of law by delaying the execution. The application is totally frivolous.
20. Reference is made to the decisions 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.”

21. In ***Rahul S. Shah (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.
22. Accordingly, the revisional application is dismissed.
23. However, there will be no order as to costs.
24. All the parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)