

**CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Rai Chattopadhyay

C.O 89 of 2024

**Rebati Kumar Sharma
Vs.
West Bengal Forest Development Corporation Limited**

For the Petitioner : Mr. Subham Gupta,
: Mr. Reshab Kumar,
: Mr. Debayan Goswami.

For the Respondent : Ms. Rima Sarkar.

**Heard on : 05/09/2024
Judgment on: 10/09/2024**

RaiChattopadhyay,J.

- 1)** In this revision, the petitioner has challenged *order No.15 dated April 24, 2024, in Civil Ex. Case No.1 of 2022*, by the Civil Judge (Junior Division) at Kalimpong. The Court has held therein that the said execution case would not be maintainable on the ground that the decree in the *O.C Suit No. 70 of 1979*, is non-executable.
- 2)** Factual background is fairly lengthy and needs to be stated. The present petitioner is the decree holder in the suit being OC

Suit No. 70 of 1979. The prayers therein inter alia were (a) *permanent injunction restraining the defendant from removing and/or selling the trees purchased and felled by the plaintiff with consequential relief of declaration that the plaintiff has a right to fell and remove the trees purchased by him and also already felled by him; (b) mandatory injunction directing the defendants to grant extension of sufficient and adequate time required for felling and removing the trees of two specified lots; and others.*

- 3) In an auction the petitioner purchased 7 lots of trees in Kalimpong Forest Division, for felling and removing within a stipulated time period and sale. The petitioner completed the job within the stipulated time period, excepting the last two lots, due to unavoidable circumstances. Allegedly, palpably illegally and in discriminatory manner, the present petitioner was not allowed to continue with the said job after September 1, 1974. Several correspondences by the petitioner thereafter, with various forest officials went in vain. The petitioner was also aggrieved that in his case, no extension of time was granted, thereby exercising gross discrimination against him, in comparison to the other merchants. The petitioner was further aggrieved that in the sale certificate granted to him on July 20, 1976, the opposite party/respondent/judgment debtor had also included the last two lots of trees for felling of which he had not been granted time and had not even been allowed to approach the trees after September 1, 1974. Thus, finding no redress from the opposite party, the petitioner filed the said suit.
- 4) The suit was dismissed by the judgment and decree dated August 18, 1999.

- 5)** The petitioner challenged the same in an appeal before the Additional District Judge, 2nd Court at Darjeeling being CO Appeal No. 22 of 1999. The Appeal Court had intervened and set aside the judgment and decree of the trial Court dated August 18, 1999. The Appeal Court allowed the appeal and decreed the suit vide judgment dated October 29, 2005.
- 6)** Thus, the decree holder/petitioner filed the execution case, for execution of the said decree in the Court of Civil Judge (Junior Division) being Execution Case No. 3 of 2007. From 2007 to 2017 the execution case was pending in the Court, while the opposite party/respondent/judgment debtor had repeatedly filed Misc. Cases in connection with the same, under section 47 of the Civil Procedure Code but could neither succeed in the Misc. Cases nor in the revisions filed against the Court's order in the said Misc. Cases. However, the said OC Execution Case No. 3 of 2007 was ultimately disposed of vide order dated August 18, 2018. The Court held that due to non-availability of the trees the decree was inexecutable.
- 7)** The petitioner/decreed holder thereafter challenged the same in an appeal being CO Appeal No. 4 of 2018. The same was dismissed vide order of the District Judge dated November 2, 2019.
- 8)** In a connected writ petition, being WPA No. 705 of 2021, the Court vide its order dated September 28, 2021, directed the petitioner to take out fresh proceedings for execution before the Civil Judge (Junior Division) at Kalimpong. Civil Execution Case No.1 of 2022 is such fresh proceeding, filed by the petitioner/judgment debtor, pursuant to the said order of the

High Court and the impugned order dated April 24, 2024, pertains to the same.

- 9) In the said order, while considering the matter of execution of the decree of the Court dated October 29, 2005 (in appeal), the executing Court held that neither the decree of the trial Court has not mentioned any schedule of the suit nor the suit property, that is the trees in question were available any further. It held that since the executing Court cannot go beyond the decree and the decree having not mentioned any schedule of property to be executed and that having not been corrected in anyway, the Court could not have gone beyond the terms of the decree. The Court had taken into consideration that in the said fresh execution case being Civil Execution Case No.1 of 2022, the decree holder/petitioner has claimed compensation to the tune of Rs.10,76,13,197.48/-, from the opposite party/judgment debtor. The Court held that compensation has never been a part of decree. That, since the executing Court cannot go beyond the decree, the execution would not therefore be maintainable, the Court held. It has held further that the decree would be executable.
- 10) Mr. Gupta appears for the petitioner. He would submit that the impugned order dated April 24, 2024, would not be tenable in the eye of law. He would say that in terms of section 21 of the Specific Relief Act, 1963, read with section 73 of the Indian Contract Act, 1872, the petitioner would be entitled to compensation and the executing court would not be barred to adjudicate the same. He says that the Court in the impugned order has erred in law, by not considering the said aspect. To buttress the same, he would refer to some judgments. First is,

reported in **AIR 1982 SC 818 [Babu Lal vs Hazari Lal Kishori Lal &Ors]**. Mr. Gupta would indicate the finding of the Court there that the word 'proceeding' in section 22 of the Specific Relief Act, 1963, includes execution proceedings also, when necessary amendment to the plaint can be made for including a claim for compensation. Next is that reported in **AIR 2018 SC 640 [Urmila Devi vs The Deity, Mandir Shree Chamunda Devi &Ors.]**. He would indicate the Court's findings that when the contract has become impossible with no fault of the plaintiff, section 21 of the Specific Relief Act, 1963, enables the Court to award compensation in lieu of specific performance. The Court has mentioned therein another earlier decision reported in **(1996) 4 SCC 593 [Kanshi Ram vs Om Prakash Lawal &Ors.]**, to rely on the proposition that in context of suit for specific performance of contract, granting decree is one of the discretions to be exercised on sound principles, that when the Court gets into equity jurisdiction, it would be guided by justice, equity, good conscience and fairness to both the parties. Lastly, he has relied on a judgment reported in **AIR 2021 SC 2622 [Sukhbir vs Ajit Singh]**, in which the Supreme Court has relied on the earlier decision in **Urmila Devi's case (supra)**, and allowed compensation.

- 11) Mr. Gupta would further emphasize on the basis of the 'proviso' to sub-section (2) of section 22, of the Specific Relief Act, 1963, that the law allows, in case of absence of any relief of specific performance of contract/compensation having been specifically prayed for in the plaint, the plaintiff to amend the plaint to include a claim for such relief, at any stage of the proceeding. He would indicate that it has also been settled that the word 'proceeding', occurring in 'proviso' to section 22 (2) of the said

Act, would include an execution proceeding too. Therefore, according to him, there would not be any legal bar for the petitioner/decreed holder/plaintiff, to incorporate his prayer for compensation in the execution proceeding. In such view of the fact, the impugned order shall not be maintainable, which has been delivered de-hors the law and erroneously, he says. He seeks the order of the Court dated April 24, 2024, to be set aside.

- 12)** Ms. Sarkar has represented the opposite party/judgment debtor/defendant in suit. She would indicate that the decree in the suit has reached its finality, having not been challenged. She mentions that admittedly schedule of property has not been mentioned in the said decree, whereas it was mandatory, in terms of Order 20 Rule 6 and/or Rule 9 or 10 of the Civil Procedure Code, to mention specifically the relief granted in the suit, the description of immovable property to identify the same, in order to enable the decree to be executable and executed. If delivery cannot be made the decree shall also state the amount of money to be paid as an alternative. The decree in the instant case, having not complied with any of the statutory mandates as above, is inexecutable and the trial Court is right in finding the same, she has stated. She would seek dismissal of the present case.
- 13)** Admittedly petitioner's suit was for declaration and permanent injunction. No prayer for specific performance of contract was there in the suit and could not have been, due to the same being time barred. Admittedly the plaint in suit by the petitioner/plaintiff, did not contain any schedule. The Appeal

Court decreed the suit, though in the decree no schedule of property has been mentioned.

- 14)** Admittedly, in the plaint, the petitioner/plaintiff has not prayed for any relief as to specific performance of contract or compensation amount. The court finds that without claiming a decree for specific performance, the other prayer also, could not have been granted to the petitioner. On the date of lodging of the suit, the execution case as well as in the present day, the suit for specific performance and/or compensation against the opposite party/defendant is ex facie barred by limitation. It is the trite law that, what cannot be done directly, cannot be achieved indirectly. The suit amounts to be frivolous and the decree, an inexecutable one.
- 15)** Petitioner's submission obviously does not inspire confidence in so far as the petitioner has proceeded as if it was a suit for specific performance of a contract, which was not. The petitioner tried to take shelter under the '*proviso*' to section 22 (2) of the Specific Relief Act, 1963 to submit that '*proceeding*' as per the same would include execution proceeding also. Hence, the petitioner will be entitled to pray before the executing Court an adequate relief due to nonperformance of the contract entered into by him with the present opposite party. Nonetheless, the petitioner could not have raised this prayer at the time of filing of the plaint, the same being time barred. The petitioner, at the subsequent stage would not be eligible to seek a relief, for which he was not eligible even at the very inception, while filing the plaint. To allow the petitioner, as prayed for in this case would amount to allow the petitioner to incorporate such a prayer by him, which he could not have made at the

time of filing of the suit being time barred and thus appears to have tried to achieve indirectly. That is not in conformity with the law and not maintainable.

- 16)** The judgments referred to by the petitioner would not be applicable as all those are related to suits of specific performance. Thus, all the said judgments would be distinguishable on facts. The petitioner's prayer would not be maintainable and the present case thus, should fail.
- 17)** C.O.No.89 of 2024 is dismissed.
- 18)** Urgent Photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of all formalities.

RAI

CHATTOPADHYAY

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(Rai Chattopadhyay, J.)