

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

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 3815 of 2024

Sri Shyamal Kanti Bagchi

VERSUS

Mrinmoy Bagchi & Anr.

For the petitioner:

Mr. Asis Bhattacharya, Adv.
Mr. Biswajit Mitra, Adv.

For the opposite parties

Mr. Sanjib Kumar Mukhopadhyay, Adv.

Last Heard on: June 20, 2025

Judgment on: September 18, 2025

Biswaroop Chowdhury, J:

This application is directed against order dated 31/08/2024 passed by Learned Civil Judge (Senior Division) Bongaon North 24 Parganas in Misc Case 08/2023. Learned Judge by the said order was pleased to dismiss the application under Section 47 of the Code of Civil Procedure on contest. The petitioner being aggrieved by the said order has come up with this application under Article 227 of the Constitution of India.

The case of the petitioner who is a judgment debtor in Misc Case No-08 of 2023 arising out of Title Execution No. 4 of 2022 is on the ground that the decree holders filed the Title Execution No. 04/2022 whereafter vide order dated 01.02.2023 direction was given to the decree holder for issuance of notice upon the judgment debtors and 21-02-2023 was fixed for steps. On the said date decree-holder did not take any steps for issuance of notice, rather, they filed an application for appointment of a survey passed Commissioner. The date of hearing the application was fixed on 09.03.2023. An adjournment was also sought for on 09.03.2023, the next date fixed was 04.04.2023. On 04-04-2023 two applications praying for amendment of execution application and the application for the appointment of a survey passed Commissioner were made by the decree holder and for the purpose of diverting the attention from the subject of issuance of notice upon the judgment debtors on 04.09.2023 the next date fixed was 21.02.2023 which was subsequently over written and changed to 04.05.2023 and that despite the fact that in the order dated 04.04.2023 the next date was fixed on 21-02-2023. Yet on 04.05.2023 the said two amendment applications of the decree holder were heard and allowed. It was further alleged that 07-06-2023 was fixed for filing of the amended applications and on the same date the same were filed that subsequently, on 20-06-2023, the application for the appointment of a survey passed Commissioner was fixed for hearing inviting written objection, if any in the meantime and on the said date the hearing could not be conducted due to

resolution of the Local bar Association and 17.07.2023 was fixed for hearing of the said application.

The Judgment Debtor also contended in the application about the merits of the case.

The decree holder filed objection to the said petition, denying the contentions of the Judgment Debtor/Petitioners.

Upon the petition and the written objection the Learned Executing Court framed the following ISSUES.

1. Whether the present miscellaneous case is not maintainable in its present form and in Law?
2. Whether the Title Execution Case No. 04/2022 is not maintainable in its present form and in law?
3. Whether the applicant judgment debtors are entitled to the relief claimed in the present case?

Upon hearing the Learned Advocate for the judgment debtor/petitioner and Learned Advocate for the decree holder/opposite party Learned Court was pleased to hold ISSUE No-1 in the affirmative and against the Judgment Debtor ISSUE No-2 in the negative and in favour of the Decree holder and ISSUE No-3 in the negative and against the petitioner/judgment debtor. Thus the application filed by the Judgment Debtor being miscellaneous case no. 08

of 2023 under Section 47 of the Code of Civil Procedure failed and the same was dismissed.

The petitioner being aggrieved by the order dated 31/08/2024 passed by Learned Executing Court in dismissing application under Section 47 of the Code of Civil Procedure has come up with this application under Article 227 of the Constitution of India.

It is the contention of the petitioner/Judgment Debtor that the petition for appointment of survey Commissioner is not maintainable along with application under Section 153 read with Section 151 of CPC. It is further contended that no execution case is tenable when the original suit is a suit for declaration and injunction and hence the Title Execution case No. 04 of 2022 is not tenable. It is also contended that the Learned Judge erred in law by allowing the application for amendment of plaint filed by the plaintiffs.

Heard Learned Advocate for the Petitioner/Judgment Debtor and Learned Advocate for opposite party/Decree holder.

Learned Advocate for the petitioner submits that the Learned Court failed to consider relevant facts before arriving at a decision.

Learned Advocate further submits that the object of declaratory decree is that where a persons status, or legal character has been denied or could have been cast upon the plaintiff and the plaintiff can sue to get the declaration.

Learned Advocate also submits that such declaration is the declaratory power of the Court which would be sound, judicious and based on the judicial principles. It is submitted by the Learned Advocate that declaratory decree is 'in personname' and not in rem. It is further submitted that it is a settled law that in a suit for declaration of title the burden lies heavily on the plaintiff and the plaintiff is not supposed to depend upon the weakness in the case set up by the defendant. Learned Advocate also submits that the very purpose of the proviso to Section 34 of the Specific Relief Act 1963 is to avoid the multiplicity of proceeding.

Learned Advocate has relied upon the following Judicial decisions:

Heemayun Begum V Shah Mohammed Khan.

1943 AIR. (PC)-94.

Vinay Krishna V Keshav Chandra and Anr.

Reported in AIR-1993 S.C. 957.

Corporation of the City of Bangalore VS M. Papaiah and anr.

Reported in 1989(3) SCC-612.

Gurce Amarjit Singh VS Rattan Chand and others.

Reported in 1996(11) SCC. P-257.

Learned Advocate for the plaintiff/Decree-holder submits that the revisional application is bad for non-joinder of parties. Learned Advocate further submits that even an illegal order if not challenged before the higher forum becomes operative and binding upon the parties. Learned Advocate also submits that a decree cannot be challenged in a proceeding under Section 47 of the Code of Civil Procedure unless it is a nullity and the scope of interference by the Learned Executing Court is very limited and restricted to rarest of rare cases only.

Learned Advocate relies upon the following Judicial decisions:

Hemra Hari VS State of Kerala.

Reported in (2006) 7 SCC P-416.

S.P. Chengalvaraya Naidu VS Jagannath.

Reported in AIR 1993 SC. 853.

Commissioner Karnataka Housing Board VS C. Muddaiah.

Reported in 2007 (7) SCC-P 689.

Before proceeding to decide the material in issue it is necessary to consider Section 47 of the code of Civil Procedure.

Section 47 of the Code of Civil Procedure Provides as follows:

S-47. Questions to be determined by the Court executing decree.

- 1) All questions arising between the parties to the suit in which the decree was passed, or their representative relating to the execution discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit.
- 2) Where a question arises as to whether any person is or is not the representative of a party such question shall for the purposes of this section be determined by the court.

Explanation-I- For the purposes of this Section a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II- a) For the purposes of this section a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed and,

b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution discharge or satisfaction of the decree within the meaning of this section.

Thus plain reading of sub-section (1) of Section 47 of the Code of Civil Procedure will go to show that the Executing Court is empowered while executing a decree which is passed, questions arising between the parties to the suit or their representatives with regard to the execution discharge or satisfaction of the decree. Hence it is clear that the Executing Court will

determine as to whether the decree has been discharged or satisfied before executing the decree. Further the Executing Court has to decide as to whether decree is executable or not. Nowhere in Section 47 of the Code of Civil Procedure it will appear that Executing Court can set aside or modify the decree.

Upon consideration of some judicial decisions it will appear that Executing Court cannot go beyond the decree.

In the case of M/S PN Pharma Marketing Service Pvt. Ltd. Guwahatu V. M/S Niehalas reported in AIR 2014. Gauhati P-84 the Hon'ble Court observed as follows:

'12. When I read the contents of the application filed by the judgment debtor and the impugned order of the executing court, it is so apparent that executing court virtually became and acted as original court as if it was deciding the suit or it acted like a first appellate court as if it was hearing regular first appeal arising out of the decree and went ahead in probing the facts, evidence and then appreciated both and then returned a factual finding contrary to what was held in main judgment on the same set of facts and some additional facts and evidence.

13. In my view it was not legally permissible to do under Section 47 at the instance of judgment debtor. In no case, the decree howsoever good or bad it may be whether on facts or in law, the court had the jurisdiction to pass it in

the suit. A decree, once passed could be challenged only in appeal by the defendant under section 96 *ibid* or in review jurisdiction under Order 47 Rule 1.

14. In the present case, the well known principle regarding jurisdiction of executing court was not applied much less in letter and spirit and the executing court on facts declared that decree was "nullity". The executing court did not appreciate the scope while deciding the application as an executing court and the appeal. This distinction in my opinion had to be kept in mind while deciding the application under Section 47 *ibid*.'

In the case of Dhurandhar Prasad Singh V Jai Prakash University and others. Reported in AIR 2001 S.C. P-2552 the Hon'ble Supreme Court observed as follows:

'23. The exercise of powers under Section 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus it is plain that executing Court can allow objection under Section 47 of the Code to the executability of the decree if it is found that the same is void *ab initio* and nullity, apart from the ground that decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing. In the case on hand, the decree was passed against the governing body of the College which was defendant without seeking leave of the Court to continue the suit against the University upon whom the interest of the original defendant devolved and

impleading it . Such an omission would not make the decree void ab initio so as to invoke application of Section 47 of the Code and entail dismissal of execution. The validity or otherwise of a decree may be challenged by filing a properly constituted suit or taking any other remedy available under law on the ground that original defendant absented himself from the proceeding of the suit after appearance as it had no longer any interest in the subject of dispute or did not purposely take interest in the proceeding or colluded with the adversary or any other ground permissible under law.’

In the case of State of MPV Mangilal Sharma reported in AIR-1998 S.C. P-743 the Hon’ble Supreme Court observed as follows:

‘8. In *Prakash Chand v. S.S. Grewal and Ors.*, [1975] Cr. LJ. 679, (Full Bench) (Punjab and Haryana High Court), the petitioner had a decree in his favour declaring his dismissal from service to be illegal, void and of no effect. The Punjab Government did not reinstate him nor paid him the arrears of salary. He, therefore, filed a writ petition for taking contempt of courts proceedings against certain officials of the State Government. The Court held as under: (at p.684 of Cri LJ)

"A declaratory decree, in my opinion, cannot be executed as it only declares the rights of the decree-holder qua the judgment-debtor and does not in terms, direct the judgment- debtor to do or to refrain from doing any particular act or thing. Since there is no command issued to the judgment-debtor to obey, the civil process cannot be issued for the compliance of that

mandate or command. The decree-holder is free to seek his legal remedies by way of suit or otherwise on the basis of the declaration given in his favour."

Thus upon considering the provisions contained in Section 47 of the Code of Civil Procedure and the judicial decisions it is clear that the Executing Court cannot go beyond the decree. In the instant matter the petitioner/judgment debtor sought to challenge the decree on merits and has contended that the decree is inexecutable.

Challenging a decree on merits before Executing Court is not permissible under law. Further the contention of the Judgment Debtor that the decree is not executable also cannot be sustained as the Decree is not merely a Declaration but there is also permanent injunction.

Learned Executing Court has given cogent reasons while dismissing the application under Section 47 of the Code of Civil Procedure filed by the Judgment Debtor/petitioner, thus the petitioner has not been able to make out grounds for interference under Article 227 of the Constitution of India.

Hence this application under Article 227 of the Constitution of India fails and the same is dismissed. The Learned Executing Court shall proceed with the execution case in accordance with law.

It is however made clear that in the event any objection is not filed by the Judgment Debtor/petitioner to any application of the decree holder which is pending disposal the same may be filed within one week from the next date fixed.

(Biswaroop Chowdhury,J)