

(1992) 05 GAU CK 0015
In the Gauhati High Court
Case No : Civil Revision No. 127 of 1986

Babul Ali

APPELLANT

Vs

Smt. Khirada Dutta and Others

RESPONDENT

Date of Decision : 12-05-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1993 Guw 56

Hon'ble Judges : D.N. Baruah, J

Bench : Single Bench

Advocate : P.G. Baruah, D. Goswami and P.K. Goswami, for the Appellant; C.C. Deka, N.C. Phukan and K. Basar, for the Respondent

Judgement

D.N. Baruah, J.—The petitioner has filed this petition u/s 115 read with Section 151 of the CPC and under Article 227 of the Constitution of India, challenging the order dated 25-3-86 passed by the Munsiff No. 1, Sibsagar in Misc. Case (J) No. 27 of 1981, arising out of Title Execution Case No. 2 of 1979, dismissing the application filed by the petitioner for restoration of possession and for compensation.

2. The petitioner's case is that the Prede-cessor-in-interest of the respondent I(a) to 1(e) instituted a suit (TS No. 16/65) praying for a decree, inter alia, for recovery of khas possession of 18 lechas of land covered by Dag No. 45 (old) Periodic Patta No. 209 (old) corresponding to new Dag No. 55 of Simalu-guri Town, Dhopabar Mouza, in the district of Sibsagar. In the plaint, however, the boundary of the suit land was not shown. The suit was decreed. An appeal preferred by the defendants/petitioners, was also dismissed. Second appeal was filed which was also dismissed. The original plaintiff as well as defendants died and the present petitioner and the defendants Nos. 1(a) to 1(e) were substituted in their places.

3. The petitioner's further case is that the land adjacent to the land included in Dag No. 55 are covered by Dag No. 54 and Dag No. 203. The petitioners and

other members of their family had been using the said land since long time. This land was used by the members of the family of the petitioner as a path-way to their residences. As a matter of fact, this land was the only land over which the ingress and egress was possible.

4. After obtaining the decree, the decree-holder filed an Execution Case (T.Ex. Case No. 2/79) to execute the decree. The petitioner further stated that, meanwhile, an execution proceeding (LA Case No. 22/80-81/NEC) was also initiated for acquisition of land covered by the said Dag No. 55 and during the course of said execution proceeding, an area of land measuring 7 lechas under Dag No. 55 was taken possession. Thus the said land in the said Dag No. 55 was reduced to the extent it was taken over in the said acquisition proceeding. On 10th March, 1981, an area of land measuring 13 lechas covered by Dag Nos. 54 and 203 was taken in execution of the said decree even though the decretal land is only under Dag No. 55. The petitioner is the owner of the lands under the said Dags.

5. Thereafter, the petitioner filed a petition u/s 47 of Code of Civil Procedure, stating, inter alia, that the executing Court on 29-9-80 issued a writ for delivery of possession in execution of the decree by demolishing the houses standing thereon with the help of Lot Mandal, Supervisor Kanungoo and armed police, but the Nazir could not execute the writ as the Mandal could not point out the actual decretal land. However, the decree was executed on 10-3-81 with the help of Lot Mandal, Supervisor Kanungoo and Armed police and the plot was delivered to the decree-holder. While executing the decree the Nazir took possession of a portion of land included in Dag No. 54 as well as in Dag No. 203, demolishing the houses of the judgment-debtor standing on the said land, and, therefore, he prayed for restoration of possession of land which was not covered by decree and for compensation of Rs.9,950/-for illegal demolition of the house belonged to the petitioner. This petition was registered as Misc. (J) case No. 27 of 1981.

6. The petitioner examined, as many as three witnesses, viz. Md. Babul Ali, Amar Bodh and Madhab Ch. Gope and the opposite party also examined two witnesses, viz. Jogendra Nath Konwar and Chandreswar Gohain. Sri Punaram Dutta, Supervisor Kanungoo was examined as a Court witness. After recording the evidence and on hearing the parties, the Munsiff by his order dated 25-3-86 dismissed the petition rejecting the prayer of the petitioner. While rejecting the prayer the Munsiff observed that Sri Punaram Dutta, Supervisor Kanungoo was appointed Survey Commissioner. This Commissioner was examined as C.W. 1. He stated that a portion of the house measuring 37"x4" standing on the land covered by Dag No. 54 was demolished while delivering possession. His report was also exhibited as Exhibit (b). From the report as well as from his deposition it appears that he did not take the measurement of the land of those dags. He also observed that the Commissioner did not take proper steps in preparing the report, and, therefore, his report could not ber accepted. Similarly, the Munsiff also disbelieved the witnesses, PWs 1 and 2, on the ground that they are tenants

of the petitioner. The Munsiff, however, accepted the evidence of DW-1, Jogendra Nath Konwar, the Supervisor Kanungoo, who was directed to assist the Nazir at the time of execution of the decree. This witness stated that he measured the Dag No. 55 and possession was delivered by Nazir. At the time of delivery, both decree-holder and judgment-debtor were present. The judgment-debtor did not file any written objection. The Munsiff also did not believe the story of acquisition of land by the government in view of the fact that there was no documentary evidence to show such acquisition. He observed that in the acquisition of the land in an acquisition proceeding, there must be some official report maintained by the acquisition department. But these things were not proved. Considering these, the Munsiff dismissed the application. Hence this present petition.

7. I have heard both sides. Now the question for determination are :-- (i) whether the application u/s 47 of the CPC is maintainable for restoration of possession of land not covered under a decree and for compensation for illegal demolition of the house; and (ii) whether the Munsiff was justified in dismissing the application under the facts and circumstances of the case ?

8. Mr. P. G. Baruah, learned counsel for the petitioner has submitted that an application u/s 47 of the CPC is maintainable in present case, inasmuch as, it relates to execution of a decree as envisaged u/s 47 of the Code of Civil Procedure. Mr. Baruah has submitted that question regarding the excess acquisition of land can be decided only in an application u/s 47 of CPC and not by a separate suit. According to Mr. Baruah, where in execution of a decree property not covered by a decree is taken possession by the decree-holder, the proper remedy for the judgment-debtor to recover the excess land by an application u/s 47 of the Code of Civil Procedure. In support of his contention, Mr. Baruah has placed reliance on the following decisions :

(i) AIR 1922 PC 279 (Rai Bahadur Chot-tey Lal v. The Collector of Moradabad),

(ii) Merla Ramanna Vs. Nallaparaju and Others, and (iii) Padmanabha Pillai Govinda Pillai Vs. Padmanabha Pillai Raman Pillai and Another,

9. In Rai Bahadur Cottey Lal (supra) the Privy Council held that where in execution of a decree the decree-holder take possession of property in excess of a decree, the remedy of the judgment-debtor is by an application u/s 47 C.P.C.

10. In Merla Ramanna (supra) the Supreme Court held that when the sale in execution of a decree is impugned on the ground that it is not warranted by terms thereof, the question can be agitated when it arises between the parties to a decree, only by an application u/s 47 not by a separate suit.

11. In PP Govinda Pillai (supra) the Kerala High Court held as follows at page 402 :--

"If a decree-holder takes in execution, land not included in the decree or in excess of the decree, the judgment-debtor must apply under this section for recovery of such land and a separate suit is not maintainable....."

12. Mr. CC Deka, learned counsel for the respondents has not seriously objected to the submission of the learned counsel for the petitioner.

13. In view of the ratio of the decision cited above, I am of the opinion that under the facts and circumstances of the present case, an application filed by the petitioner u/s 47 of the CPC is maintainable.

14. Next submission of Mr. Baruah, is that the Munsiff failed to exercise his jurisdiction vested in him by not allowing the prayer of the petitioner, even though the decree-holder took over possession of some land included in Dag Nos. 54 and 203 by dismantling the houses standing thereon, though the said houses are not covered by a decree. Mr. Baruah, has further submitted that the munsiff while dismissing the petition did not apply his mind to the evidence of the witnesses for the petitioner and the C.W. 1. While rejecting the evidence of C.W. 1 the munsiff took a double standard, inasmuch as, he rejected the evidence of Supervisor Kanungoo, C. W. I Punaram Dutta, on the ground that he did not take proper measurement of Dag Nos. 54 and 203. But the said witness while preparing the report proved the map and the field book. But on the other hand, the munsiff relied on the deposition of the DW-1, Sri Jogendra Nath Konwar, who accompanied the Nazir, at the time of execution of the decree. This witness, DW-1, also did not say that he took the measurement of the land included in Dag Nos. 54 and 203. In spite of this his evidence was accepted. Besides, the evidence of PWs 2 and 3 was discarded by the munsiff solely on the ground that they happened to be the tenants of the petitioner. The evidence of the witnesses cannot be rejected merely because they are tenants under the petitioner. The tenants who are living in the suit premises can be better witnesses than any other chance witness. On this ground, Mr. Baruah has submitted that the findings arrived at by the munsiff was perverse as the same was without proper application of mind.

15. Mr Deka, learned counsel for the respondents while supporting the decision of the munsiff strenuously argued that the evidence of DW-1, Supervisor Kanungoo, who accompanied the Lot Mandal at the time of execution of the decree should be relied on. He has also submitted that his case is different in view of the fact that there was no obligation on his part to measure the land.

16. After considering the rival contentions of the learned counsel for the parties, I find that the submissions of Mr. Baruah has got sufficient force. The Munsiff unreasonably discarded the evidence of C.W. 1 and rejected the prayer. When the complaint is made regarding taking over property in an execution of decree, which is outside the decretal property, it is not only the duty of the party who alleges such excess, but it is also the duty of the court to find out the truth in order to further the justice, here, in this case, the Munsiff simply rejected the petition finding fault with the evidence of the witnesses without proper application of mind. The Munsiff rejected the evidence of C.W. 1 for not taking measurement, but similar evidence of DW-1 was accepted. This appears to be not in conformity with the established principles of law.

17. For what have been stated above, I hold that the impugned order cannot be sustained in law. The Munsiff had shirked his responsibility to find out the truth by discarding the evidence on some technical grounds. The Munsiff also did not shift the evidence in proper perspective. I, therefore, set aside the impugned order and remand the case to the Munsiff with a direction to pass order after shifting the evidence of the witnesses on record on the basis of established principles of law. This shall be done within a period of three months.

18. With the above observation the petition is disposed.