

(2017) 04 OHC CK 0031

In the Orissa High Court

Case No : 12873 of 2005

**Jaydev Panda Vs Surendranath Panda(dead) through?his LRs.-
Kanchanbala Panda & others**

Date of Decision : 05-04-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Section 100](#),
[Section 47](#), [Section 96](#), [Order 7Rule 3](#) - Second appeal - Questions to be
determined by the Court ex

Citation : (2017) 04 OHC CK 0031

Hon'ble Judges : D.Dash

Bench : SINGLE BENCH

Advocate : Sanatan Das, P.K. Mishra, A.K.Sahu, S.S. Mishra,?Sabita Ranjan
Patnaik, Padmaja Pattnak, R.P. Pattnaik, P.Behera, P.K. Swain, D. Pradhan, N.K.?
Senapati, N.K.Biswal, R.P.Pattnaik

Judgement

1. The petitioner by filing this application under Article 227 of the Constitution of India seeks quashment of an order passed by the learned 1st Additional Civil Judge (Sr. Division), Cuttack in CMA No.67 of 2004 in the matter of a petition under section 47 of the Code of Civil Procedure filed by the petitioner being the judgment-debtor in Execution Case No.10 of 1989. By the said order the learned Judge has rejected the petition under section 47 of the Code filed by this petitioner in refusing to hold the decree passed in Title Appeal No.20/84/53 of 1981/82/84 by the learned 2nd Additional District Judge, Cuttack as inexecutable.

The subject matter of impeachment is the above order dated 31.08.2005. The genesis of the present lis is traceable to Title Suit No. 48 of 1977 which has been decided by the learned Civil Judge (Senior Division), Ist Court, Cuttack.

2. Essential facts for the purpose may be stated as under: (a) One Baikunthanath Panda had filed Title Suit No.48 of 1977 arraigning the petitioner as defendant no.1 besides, others as the defendants. The suit was for declaration that the gift deed dated 18.12.1973 said to have been executed by him and defendant no.2, namely, Agani Dibya W/o. Banchanidhi Panda who happens to be

the brother of Baikunthanath Panda in favour of defendant no.1 (present petitioner as also the applicant of the petition under section 47 of the Code before the Executing Court and judgment-debtor in the Execution Proceeding) as void, illegal and inoperative. In the said suit a prayer for issuance of permanent injunction against the said defendant no.1 had also been advanced for restraining him from disturbing the possession of Baikunthanath, the original plaintiff.

(b) The suit having finally been dismissed, the First Appeal under section 96 of the Code had been filed. In view of death of original plaintiff -Baikunthanath Panda, the present opposite party no.1 pursued the first appeal. The learned 2nd Additional District Judge, Cuttack has finally allowed the same. The ordering portion of the judgment is as follows:

" It is hereby declared that the alleged deed of gift Ext-B dated 18.12.1973 is void, illegal and inoperative and defendant no.1-respondent no.1 had derived no title to the suit property and he is permanently restrained from interfering with the possession of the appellant (the present opposite party no.2 who was then represented by the opposite party no.1 as his father guardian) in respect of the same. The subsequent transfers made by the defendant no.1-respondent no.1 in favour of defendant nos. 3 to 7-respondent nos.3 to 7 are also invalid.

(c) The petitioner being aggrieved by the above judgment and decree in the First Appeal approached this Court by filing Second Appeal under section 100 of the Code which was numbered as S.A. No.112 of 1985. The appeal stood finally dismissed. So, this petitioner had approached the Hon'ble Supreme Court by filing SLP (Civil) No.21994 of 2004. The same also stood dismissed. Thus, the judgment and decree passed in the First Appeal continue to hold the field as wholly binding upon the parties.

(d) The present opposite party no.2 had instituted the Execution Case No.10 of 1989 alleging dispossession, claiming recovery of possession by way of execution of that decree for permanent injunction. This was originally not alleged and prayed for in the execution proceeding. So when the petition filed in that behalf was allowed, the present petitioner prayed to drop the said execution case resisting the inclusion of prayer for delivery of possession of the suit property. Said petition of the petitioner (judgment-debtor) was, however, rejected.

The Second Appeal having been dismissed by this Court and so also the SLP before the Apex Court, this petitioner next filed a petition under section 47 of the Code praying before the Executing Court to pass an order determining his share and making him entitled to lawful possession over the suit land. It had been averred therein that the suit property was the ancestral property of Baikunthanath Panda, who had bequeathed his 1/3rd share in favour of the petitioner and the suit schedule property is limited to that extent only. The decree was attacked as to have been without any specific description of the land. It is also stated that the properties forming the subject matter of the Execution

Proceeding have not been described in consonance with the properties as stated in the schedule of the plaint and the decree, itself. The specification of the land in other words, is said to be ambiguous. It is next stated that one Upendra Panda was the owner of the 1/3rd share of the joint family property. The petitioner also claimed to have purchased 1/3rd share of said Upendra along with the natural father of opposite party no.2 by registered sale deed dated 10.03.1966. It is asserted that he has been in possession of his purchased land, i.e., a part of the joint family properties of Baikunthanath and Upendra. It is also stated that said land has been recorded jointly in the Hal settlement as well as in the Consolidation. The petitioner asserted to have constructed a dwelling house on the part of the homestead land over and within his purchased area and claims to have been staying thereon with his family having no other dwelling house. So, finally it is said that so long as the properties purchased by registered sale deed dated 10.03.1966 are not demarcated, the execution of the decree is nay possible. Therefore, in the absence of that demarcation, the decree is challenged as inexecutable and thus it is prayed to dismiss the execution proceeding.

The opposite party in his objection not only questioned the maintainability of the petition under section 47 of the Code but also asserted that none of the grounds attacking the decree and questioning its executability are tenable in the eye of law.

3. The learned Executing Court in view of above objection raised to the execution of the decree treating as permissible for being taken under section 47 of the Code has proceeded to examine the same. In that extensive exercise, having further received documentary and oral evidence, the learned Executing Court has framed the following points for decision. (i) Whether the petitioner has got any cause of action?

(ii) Whether the specification of the scheduled property is ambiguous and is not in consonance with that of the property of plaint in T.S. No.48/77?

(iii) Whether the petitioner has got purchased 1/3rd share of Upendra Panda along with natural father of O.P. by R.S.D. No.1223 dated 10.03.1966 and without demarcating it, the decree cannot be executed?

(iv) Whether this Misc. Case is hit under the principles of resjudicata?

(v) Whether the Misc. Case is to be stayed in view of the pendency of the Consolidation Revision?

(vi) Whether the recordings in the Consolidation Proceedings are behind the back and without knowledge of the petitioner and does not extinguish his rights, over the property?

(vii) To what relief, the petitioner is entitled?

4. (a) Point Nos.(i) and (iii) have been answered as under:- In view of the failure of the petitioner to establish purchase of any land involved in the execution

proceeding, the entire claim put forth about non-executability of the decree without demarcating the said land is bound to fail and it can be said that the petitioner has got any cause of action.

(b) Point no.(ii) has been decided as follows:-

However, the petitioner has not produced the plaint of the suit to show improper description of the properties. On the other hand, the opposite parties have proved Ext.K/1 which shows that the properties involved in the execution have been identified by him giving the necessary survey numbers under Lot no.1 of the schedule-B. Due to supply of the necessary Khata and Plot Nos. along with its area, properties have been property described in the decree. In such view of the matter, the contention that the specification of the schedule property is ambiguous and is not in consonance with the property description in the suit is bound to be rejected. In the schedule of the execution, the direction of the rooms over which the petitioner is in forcible possession has been clearly given along with the area of the land for which the execution is sought for. Such property is easily identifiable in view of its description by giving its place of existence in the schedule.

(c) Point Nos.(v) and (vi) have received the decision as noted hereunder:-

After reproducing the order of this Court in W.P.(C) No.279 of 2005, it has been said that:-

The aforesaid observation of the Hon''ble Court does not indicate any direction to the effect that the issues involved in the Consolidated Revision No.512/2004 should be adjudicated by this Court while deciding the application U/S.47 of the C.P.C. Therefore, the aforesaid contention of the petitioner is without any basis and is not entertainable. In view of the reasons as stated above, I am inclined to hold that there is no need to stay this Misc. Proceeding in view of the pendency of the consolidation revision and the matter of right, title etc. of the petitioner over the property need not be decided by this Court in this proceeding.

(d) Lastly the answer to the point no.(vii) has been given basing upon the answers to point no.(i) and (iii) as also point no.(ii), as well as point no.(v) and (vi).

5. I have heard Mr. S. Das, learned counsel for the petitioner and Mr. S.R.Patnaik, learned counsel for the opposite parties. I have also gone through the followings:

- i) judgment of T.S. No. 48 of 1977 and T.A. No. 28/84/53 of 1981/82/84,
- ii) the petition under section 47 of the Code and the objection to the same, and
- iii) the order of the learned Executing Court in the CMA No. 67 of 2004, the subject matter of the present proceeding which has been sought to be quashed.

6. The trial court in the suit as it appears has answered in the negative, the claim

as to the status of the petitioner as adopted son of Baikuntha in answering the particular issue framed for the purpose. Next going to decide the contentious issue regarding genuineness and validity of the purported gift deed standing in favour of the petitioner, the trial court has found the document to be invalid in the eye of law and so also the other subsequent transactions basing upon the same. While deciding the said issue the specific conclusion arrived at has been that the so called gift had not been acted upon. In this connection, the so called donors, i.e. the original plaintiff and the defendant no.2 when had claimed to have never parted with the possession of the property covered under the gift deed, the trial court has said that the evidence of the petitioner to be not satisfactory on the score that pursuance to the deed gift, the possession of the property so described therein had been delivered to him as the donee. It has further been found that the transaction was not acted upon which in the present case mainly refers to the acceptance and the mode of the same in the fact and circumstance being with regard to delivery of possession and continuance of the same as such in the hands of the donee has accordingly been answered in the negative. The suit however had been dismissed only on the ground of limitation that it having been filed after expiry of three years is barred by law of limitation.

7. The appeal had been filed thus only against the said finding on the question of limitation as had been held by the trial court in non-suiting the plaintiff despite all other findings standing in favour of the suitor. The first appeal having been filed, no such cross-appeal or cross-objection had been taken by the petitioner in questioning the other findings on contentious issues as recorded by the trial court. The first appellate court however has affirmed all those findings including that of the status of the plaintiff. Even in the absence of any crossobjection or cross appeal, the lower appellate court has taken the rival contentions advanced before it with regard to validity of the purported gift. Addressing the said point, it has arrived at the same finding that the trial court had so returned. The only issue answering which the plaintiff had been non-suited by the trial court has been answered by the first appellate court in favour of the suitor and against the petitioner. It may be further mentioned here that the lower appellate court has given the finding that the petitioner had not taken possession of the land pursuant to the purported deed of gift coming into being and that is with further finding that so called donees, the plaintiff and defendant no.2 have never intended to go for gift as projected in favour of the petitioner.

Ultimately this petitioner having carried the matter up to the Apex Court has not been able to succeed in getting any of said finding set at naught much less to say the final result of the suit. So the suit has been decreed granting the relief of declaration and permanent injunction.

8. It is no longer res integra that an Executing Court can neither travel behind the decree nor sit in appeal over the same or pass any order jeopardizing the rights of the parties thereunder. It is only in the limited cases where the decree is by a court lacking inherent jurisdiction or is a nullity that the same is rendered

nonest and is thus inexecutable. An erroneous decree cannot be equaled with one which is a nullity. As it is, Section 47 of the Code mandates determination by an executing court, questions arising between the parties or their representatives relating to the execution, discharge or satisfaction of the decree and does not contemplate any adjudication beyond the same. A decree of court of law being sacrosanct in nature, the execution thereof ought not to be thwarted on mere asking and on untenable and purported grounds having no bearing on the validity or the executability thereof.

9. Judicial precedents to the effect that the purview of scrutiny under Section 47 of the Code qua a decree is limited to objections to its executability on the ground of jurisdictional infirmity or voidness are plethoric. The Apex Court, amongst others in *Vasudev Dhanjibhai Modi vs. Rajabhai Abdul Rehman and others* 1971 (1) SCR 66 in essence enunciated that only a decree which is a nullity can be the subject matter of objection under Section 47 of the Code and not one which is erroneous either in law or on facts. The following extract from this decision seems apt: " A Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction."

Though this view has echoed time out of number in similar pronouncements of the Apex Court, in *Dhurandhar Prasad Singh vs. Jai Prakash University and others*, AIR 2001 SC 2552, while dwelling on the scope of Section 47 of the Code, it was ruled that the powers of the court thereunder are quite different and much narrower than those in appeal/revision or review. It was reiterated that the exercise of power under Section 47 of the Code is microscopic and lies in a very narrow inspection hole and an executing court can allow objection to the executability of the decree if it is found that the same is void ab initio and is a nullity, apart from the ground that it is not capable of execution under the law, either because the same was passed in ignorance of such provision of law or the

law was promulgated making a decree inexecutable after its passing.

10. Now let me advert to the contextual facts and the objections raised. The petitioner admittedly has no natural connection with the family of the plaintiff and that is the reason, he has claimed the position in the family as the adopted son of the plaintiff. Therefore, the question of his possessing any part of the property of the family before the said deed of gift thus never arises.

11. In the Execution Proceeding his claim however stands on a completely different footing that he along with the natural father, the present opposite party no.1, namely, Surendra had purchased 1/3rd share of Upendra, the son of Kanduri and grandson of Arta, the common ancestor and on that basis, he claims to have taken the possession of the purchased property of his 1/6th share where he says to be staying by constructing the house. So he asserts that without demarcation of the same, the execution of the decree for injunction in respect of the property described in the suit cannot at all take place.

12. It is pertinent to mention here that when the plaintiff had described the suit land covered under the purported gift deed, nothing is noticeable from the judgments of the courts below that this petitioner had taken a specific plea with regard to the vague identification of the suit property and that it is hit under the provision of Order 7, Rule 3 of the Code. The petitioner had also not challenged the issuance of decree for permanent injunction in respect of the property described in the plaint in view of the vagueness of the description of the property. On the other hand, the fact stands that the judgment and decree of the first appellate court are now operating in the field since the subsequent move of the petitioner to either non-suit the plaintiff or to deny him with any of those reliefs have failed all through. The claim of the petitioner that he had been in possession of the property on the strength of said gift has been negatived. Proceeding further, by assuming that the petitioner is one of the purchasers with respect of the interest of Upendra from out of the ancestral property of which, the suit property forms a part, the said deed is seen to be of the year 1966 i.e. dated 10.03.1966. This was not pleaded specifically in the suit that while so possessing the purchased property, the petitioner had been given the delivery of possession of the property covered under the gift deed and he has remained in possession by way of amalgamation.

More interestingly, the fact remains that after the purported deed of gift came into being on 18.12.1973, he has gone on executing the sale deeds by selling the property out of the so called gifted property, in part to Dambarudhar, Charturbhuj and Sulachana who are the defendant nos. 3, 4 and 7 who were also the respondents in the appeals. They had not contested the suit asserting their possession nor even thereafter. It is contended here that said sold property have no nexus with this item of purchased property involved in the execution and therefore the same is of no such significance to be taken note of. We are in fact not at all on that point. I am afraid to accept the contention of the petitioner merely viewing and taking into account that when the petitioner himself is selling

the property even in part to others that he had claimed to have got on the strength of said deed of gift, how is he going to question the identity of the property described in the purported gift deed which is the very base of his case in acquiring the right, title and interest over the property. Such a defence in the execution not only appears to be an afterthought but also misconceived. Furthermore, when the sale deed according to the case of the petitioner stands jointly in his favour and in favour of Surendra and that is said to be towards 1/3rd interest of Upendra, i.e. each having 1/6th share, the same in my considered view cannot be taken and accepted as a ground to question the executability of the decree for injunction in respect of the property involved in the suit when the very claim of the petitioner over the said property has already been negated all throughout and when he has been found to be not in possession of any part of the said property. Moreover, when he himself on the basis of that deed claiming to have derived title, had executed the sale deed in favour of others, they have never come forward to complain though arraigned in the proceedings throughout. Merely, because now a suit for partition i.e. T.S. No. 83 of 2008 is stated to be pending at the instance of Hemalata daughter of Surendra, the execution of the present decree cannot remain in abeyance till its final adjudication and at best this execution when finally takes place may in future stand to be so controlled by the execution that if passed and so executed.

The ratio of cited decision in case of Rama Subudhi and others vrs. Bhagirathi and others; 53(1982) CLT 78 has no application to the instant case in view of its facts and circumstances as discussed. Having regard to the contextual facts and the objections raised by the petitioner, I am of the unhesitant opinion that no case has been made out to entertain the remonstrances against the decree.

Under the circumstance, the petitioner is wholly estopped to question the identity of the property covered under the deed of gift which is the suit land.

13. In the wake of aforesaid discussion, although I find that above fundamental aspects have escaped the sight of the executing court yet not fault or flaw is found with the ultimate result of dismissal of the petition under section 47 of the Code passed by the Execution Case negating the grounds of attack to the executability of the decree that has been the outcome of detail discussion on the merit of the objection with reference to the pleadings and evidence laid. The objections to the execution petition as detailed in and the application under section 47 of the Code do not disclose any substantial defence to the decree in order to testify the same to be suffering from any jurisdictional infirmity or invalidity. Thus, on consideration of all relevant aspects in the entirety, I find no reason and justification to interfere with the impugned order in exercise of the power under Article 227 of the Constitution and am therefore disinclined to upset the order.

14. At this stage, it is worthwhile to quote the observation of the Privy Council in case of (The General Manager of the Raj Durbhnga under the Court of Wards vs. Maharajah Coomar Ramaput Singh) as pointed out with further expression of

anxiety in case of [Kuer Jang Bahadur vs. Bank of Upper India Ltd., Lucknow [AIR 1925 Oudh 448]. " The difficulties of a litigant begin when he obtains a decree. It is necessary to remember that success in a suit means nothing to a party unless he gets the relief. Therefore, to be really meaningful and efficient, the scheme of the Code should enable a party not only to get a decree quickly, but also to get the relief quickly. This requires a conceptual change regarding civil litigation, so that the emphasis is not only on disposal of suits, but also on securing relief to the litigant."

Courts in India have to be careful to see that process of the Court and law of procedure are not abused by the judgment-debtors in such a way as to make Courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights.

Above observations have also taken note of in case of Shub Karan Bubna alias Shub Karan Prasad Bubna vs. Sita Saran Bubna and Ors; (2009) 9 SCC 689 as under:-

"In the present system, when preliminary decree for partition is passed, there is no guarantee that the plaintiff will see the fruits of the decree. The proverbial observation by the Privy Council is that the difficulties of a litigant begin when he obtains a decree. It is necessary to remember that success in a suit means nothing to a party unless he gets the relief. Therefore, to be really meaningful and efficient, the scheme of the Code should enable a party not only to get a decree quickly, but also to get the relief quickly. This requires a conceptual change regarding civil litigation, so that the emphasis is not only on disposal of suits, but also on securing relief to the litigant."

The Apex Court again in case of Satyawati vs. Rajinder Singh and Another: 2013 (II) CLR (SC) 238 has gone to express:-

xxx xxx xxx

xxx xxx xxx

"As stated by us hereinabove, the position has not been improved till today. We strongly feel that there should not be unreasonable delay in execution of a decree because if the decree holder is unable to enjoy the fruits of his success by getting the decree executed, the entire effort of successful litigant would be in vain."

For the aforesaid, in view of the delay already occasioned I conclude with the hope and trust that the Executing Court will do the needful as directed hereunder as expeditiously as possible.

15. In the wake of aforesaid, viewing to the age of the proceeding, as also the long career of the litigation, the executing court is directed to make all such endeavour for early conclusion of the proceeding in accordance with the law as expeditiously as possible, preferably within a period of four months hence.

16. Accordingly, the application is dismissed with cost throughout.